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Ty Eldridge and Marina Eldridge v. James L. Farnsworth; David Farnsworth; Gregory Farnsworth : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TY ELDRIDGE and MARINA ELDRIDGE, Plaintiffs/Appellants, vs. JAMES L. FARNSWORTH; DAVID FARNSWORTH; GREGORY FARNSWORTH, Defendants/Appellees.	)	Case No. 20060333-CA

BRIEF OF APPELLEES/CROSS-APPELLANTS

Appeal from the Eighth Judicial District Court of Duchesne County
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STATEMENT OF JURISDICTION

The jurisdiction of the Utah Court of Appeals is pursuant to Utah Code Ann. § 78-2a-3(j).

ISSUES PRESENTED FOR REVIEW WITH STANDARDS OF REVIEW

Plaintiffs' Claims

1. Should this Court uphold the trial court's granting of summary judgment, dismissing Plaintiffs' second amended complaint, where dismissal was based on Plaintiffs' sworn testimony from the temporary injunction hearing that they had not tendered performance under the real estate purchase contract, but instead began negotiating a lease option that was never accepted by nor signed by Defendants?

"A trial court's decision to grant or deny a motion for summary judgment is a legal one and will be reviewed for correctness." Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 733 (Utah 1995).

2. Should this Court uphold the trial court's denial of specific performance of the real estate purchase contract, which Plaintiffs abandoned in favor of negotiating a lease option, where Plaintiffs, in their complaint, asked for enforcement of the contract only under a theory of fraud, which theory they do not brief on appeal, instead claiming on appeal a breach by Defendants and an excused tender by Plaintiffs?

A trial court's decision on whether to require specific performance is an equitable one, reviewed for abuse of discretion, Carr v. Enoch Smith Co., 781 P.2d 1292, 1294 (Utah Ct. App. 1989), while "[a] trial court's decision to grant or deny a motion for summary judgment is a legal one and will be reviewed for correctness." Silver Fork Pipeline Corp., 913 P.2d at 733.

3. Should this Court uphold the trial court's rejection of Plaintiffs' promissory estoppel claim where Plaintiffs, after failing to obtain financing to close the REPC, prepared a written proposed lease option which they submitted to Defendants and which Defendants did not accept, sign or return to Plaintiffs and where Defendants did not indicate that they would not require a written, signed agreement that complied with the statute of frauds?

"Promissory estoppel is an equitable claim . . . ." Andreason v. Aetna Cas. & Sur. Co., 848 P.2d 171, 174 (Utah Ct. App. 1993). As a trial court's determination thereon is an equitable one, it is reviewed for abuse of discretion, Carr, 781 P.2d at 1294, while "[a] trial court's decision to grant or deny a motion for summary judgment is a legal one and will be reviewed for correctness." Silver Fork Pipeline Corp., 913 P.2d at 733.

4. Should this Court uphold the trial court's denial of Plaintiffs' motion to amend to add a breach of contract claim, where that claim was not raised in Plaintiffs' amended complaints but rather belatedly raised by motion after the entry of the

summary judgment, and where, in any case, Plaintiffs failed to perform their obligations under the real estate purchase contract?

"[This Court] overturn[s] a trial court's denial of a motion to amend a complaint only when . . . [the Court] find[s] an abuse of discretion." Kelly v. Hard Money Funding, Inc., 87 P.3d 734, 739 (Utah Ct. App. 2004). Meanwhile, "[i]f a contract is unambiguous, interpretation of the contract is a question of law, . . . review[ed]. . . under a correctness standard." Craig Food Indus., Inc. v. Weihing, 746 P.2d 279, 283 (Utah Ct. App. 1987).

5. Should this Court uphold the trial court's rejection of Plaintiffs' motion to amend its complaint to add a claim for breach of the covenant of good faith and fair dealing, where that claim was not raised in Plaintiffs' amended complaints but raised only after the entry of the summary judgment dismissing the Plaintiffs' complaint and where the alleged wrongful actions of Defendants occurred only after the REPC had been set aside and the date for closing had passed?

"[This Court] overturn[s] a trial court's denial of a motion to amend a complaint only when . . . [the Court] find[s] an abuse of discretion." Kelly, 87 P.3d at 739.

6. Should this Court uphold the trial court's decision not to permit Plaintiffs to amend their complaint pursuant to Rule 15(b), where Plaintiffs' complaint had already been dismissed by

summary judgment and where Plaintiffs had already filed two amended complaints?

"[This Court] overturn[s] a trial court's denial of a motion to amend a complaint only when . . . [the Court] find[s] an abuse of discretion." Kelly, 87 P.3d at 739.

7. Should this Court reject Plaintiffs' entreaty to find Utah Code Ann. § 78-40-2.5 unconstitutional on due process grounds where the due process argument was limited, before the trial court, to the right to appeal and other due process issues are raised for the first time on appeal, where the statute affords parties an opportunity to be heard before any ruling on a motion brought pursuant thereto and where the losing party may apply for a stay pending appeal?

"Constitutional issues . . . are questions of law . . . review[ed] for correctness." Chen v. Stewart, 100 P.3d 1177, 1185 (Utah 2004).

8. Should this Court uphold the trial court's ruling denying Plaintiffs' request for reimbursement of attorney fees where Plaintiffs did not prevail at the trial court?

"Whether attorney fees are recoverable is a question of law, . . . review[ed] for correctness." R.T. Nielson Co. v. Cook, 40 P.3d 1119, 1125 (Utah 2002).

Defendants' Cross-Appeal

9. Did the trial court err when it determined that Plaintiffs' lis pendens was not a wrongful lien on Defendants' property, where Plaintiffs sought to enforce a lease option that was not accepted nor signed by Defendants, where Plaintiffs sought to enforce a real estate purchase contract that, following a temporary injunction hearing, the trial court found unenforceable due to Plaintiffs' failure to tender their performance and where Defendants notified Plaintiffs to remove the lien based on the ruling of the trial court following the injunction hearing?

"[I]ssues of law . . . [are] review[ed] for correctness." State v. Gonzales, 127 P.3d 1252, 1254 (Utah Ct. App. 2005).

10. Did the trial court err by not awarding Defendants their attorney fees where the contract provided that the prevailing party should recoup attorney fees incurred in an action to enforce the contract and where Defendants were required to defend against Plaintiffs' efforts to enforce the contract?

"Whether attorney fees are recoverable is a question of law, . . . review[ed] for correctness." R.T. Nielson Co., 40 P.3d at 1125.

11. Should Defendants recover the attorney fees incurred on appeal where the contract provides for the prevailing party to recover fees?

"Whether attorney fees are recoverable is a question of law, . . . review[ed] for correctness." R.T. Nielson Co., 40 P.3d at 1125.

CITATION TO THE RECORD AS TO ISSUE PRESERVATION

Defendants raised the issues of wrongful lien and/or attorney fees in their answer and counterclaim, R. 64-73, their Motion to Award Fees and Costs with its companion memorandum, R. 522-36, their subsequent reply memorandum, R. 568-81, and their memorandum in opposition to Plaintiffs' summary judgment motion. R. 421-66. The trial court awarded fees for the injunction hearing, based on statute, but denied the request for fees based on the REPC. R. 729.

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code § 25-5-3

> Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

Utah Code Ann. § 38-9-4. See Addendum A.

Utah Code Ann. § 78-40-2. See Appellants' Addendum 1.

Utah Code Ann. § 78-40-2.5. See Appellants' Addendum 2.

Utah R. Civ. P. 15(b). See Appellants' Addendum 4.

STATEMENT OF THE CASE

Plaintiffs, as buyers, and Defendants, as sellers, executed a real estate purchase contract (REPC) in August of 2004 with a closing date of October 24, 2004. In September 2004, Plaintiffs

informed Defendants that they could not obtain financing. The parties, at the suggestion of Plaintiffs, then started to negotiate the terms of a lease with option to purchase (the Proposed Lease). The parties did not come to an agreement on the terms of the Proposed Lease and, in late October, Defendants received another offer for the property and sold the property to a third party. Plaintiffs then filed a complaint for specific performance. After Plaintiffs testified that they had not performed under the REPC, the complaint was amended to seek enforcement of the Proposed Lease under the theories of fraud, waiver and promissory estoppel, and enforcement of the REPC under a fraud theory, which Plaintiffs did not brief on appeal.

Course of Proceedings and Disposition

The case has a lengthy procedural history due primarily to the numerous amendments and motions filed by Plaintiffs in an effort to find a claim on which they might prevail. The proceedings are as follows:

1. The original complaint was filed in November 2004. R. 5.

2. A hearing on Plaintiffs' request for an injunction was held on November 29, 2004. At that hearing, Plaintiffs admitted that they encountered difficulty obtaining financing to purchase the property, that they then began negotiating a lease option and that they never tendered the purchase price. See Addendum B,

excerpts from temporary injunction hearing. The trial court denied Plaintiffs' request for an injunction. R. 47.

3. On January 20, 2005, Plaintiffs filed their First Amended Complaint changing their theories and requesting enforcement of the Proposed Lease under the theories of fraud, waiver and promissory estoppel, and enforcement of the REPC under a fraud theory. R. 57.

4. Defendants filed an answer and counterclaimed for reimbursement of legal fees and costs, as well as damages under the wrongful lien statute and the terms of the REPC. R. 64.

5. On August 26, 2005, Defendants filed their motion for summary judgment. R. 117.

6. On November 1, 2005, Plaintiffs' filed a responsive memorandum and cross-motion for summary judgment. R. 191.

7. Plaintiffs also filed a motion to amend their complaint for the second time, pleading the same causes of action but attempting to plead fraud with more particularity. R. 368.

8. Oral argument on the motions was held on December 19, 2005. R. 498.

9. On January 11, 2006, the court issued its Ruling and Order, granting Defendants' summary judgment motion, dismissing Plaintiffs' second amended complaint and denying Plaintiffs' cross-motion for summary judgment. R. 508, Addendum C.

10. Defendants then filed their Motion to Award Costs and Fees seeking the relief requested in their counterclaim. R. 534.

11. On January 30, 2006, Plaintiffs filed a motion to reconsider and attempted therein to assert new claims. R. 553.

12. On March 14, 2006, Plaintiffs filed a motion to conform the complaint to the evidence with a proposed Third Amended Complaint which asserted new claims. R. 643.

13. On March 29, 2006, the trial court issued its Ruling and Order denying Plaintiffs' motions to reconsider and granting Defendants' motion for fees only as it related to the injunction hearing. R. 661, Addendum D.

14. On April 10, 2006, Plaintiffs filed their Notice of Appeal. Defendants responded with a Notice of Cross-Appeal, filed on April 25, 2006. Defendants also filed a motion to release the lis pendens on that same day. R. 702.

15. On April 26, 2006, the trial court signed its order dismissing Plaintiffs' Second Amended Complaint, denying Plaintiffs' motion to reconsider, dismissing Defendants' wrongful lien claim, and awarding Defendants the fees incurred at the injunction hearing. R. 729, Addendum E.

16. On May 10, 2006, Plaintiffs filed their Motion for Stay of the Execution of the Court's Orders and for Approval of the Plaintiffs' Supersedeas Bond. R. 748.

17. On May 15, 2006, the trial court issued its Ruling, denying Plaintiffs' Motion to Conform the Complaint to the Evidence. The trial court followed this ruling with two rulings on

June 21, 2006, one staying execution of its orders contingent upon a bond being given by Plaintiffs, and the other rejecting Plaintiffs' opposition to the fees awarded for the temporary injunction hearing. R. 779, Addendum F.

18. On August 16, 2006, the trial court issued a Ruling and Order granting the release of the lis pendens, under Utah Code Ann. § 78-40-2.5. R. 838, Addendum G.

19. Plaintiffs, on August 23, 2006, moved for a stay of this order and submitted a proposed bond with the trial court and with this Court. This Court issued its order stating that the issue must first be decided by the trial court and citing authority that Plaintiffs might need to bring a separate appeal on Defendants' motion, as it could be deemed an enforcement action. R. 846.

20. On November 21, 2006, the trial court issued its last ruling denying Plaintiffs' motion to amend their appeal, and granting their motion to stay execution of the court's order based upon Utah Code Ann. § 78-40-2.5. R. 876, Addendum H.

Statement of the Facts

This statement of the facts, as that found in Defendants' summary judgment memorandum, is based primarily on the sworn testimony of Plaintiffs at the injunction hearing on November 29, 2004, excerpts of which are attached as Addendum B, and the transcript of which is listed at page 880 in the record. After that

date, Plaintiffs' facts changed and expanded in an effort to defeat summary judgment.

While "searching the internet," Plaintiff Ty Eldridge (Ty) learned of Defendants' intent to sell 280 acres in Duchesne County, Utah. R. 880:18:16-23. Sometime in August, 2004, Ty contacted Defendant James Farnsworth (James) about the property. R. 880:19:2-5. On August 24, 2004, James executed the REPC. J. Farnsworth Dep. at 30:1-4, R. 121-79 (Exhibit B therein). Three days later, Ty and his wife, Marina Eldridge (Marina), signed the REPC. See REPC, Addendum I.

The REPC designated the purchase price as $339,000. REPC ¶ 2.1. The REPC further provided that October 24, 2004 would be the settlement deadline, REPC ¶ 24(d), and that "[t]h[e] Contract [could] not be changed except by written agreement of the parties." REPC ¶ 14. Plaintiffs submitted a check for the earnest money deposit to Basin Land Title, the closing agent, R. 880:22:20-24, and applied for financing from Washington Mutual. R. 880:23:22-23.

Washington Mutual informed Plaintiffs that the bank "wouldn't loan on a working farm." R. 880:24:21-24. Hence, Plaintiffs, on September 9, 2004, prior to the time seller disclosures were due, REPC ¶ 24, contacted James to tell him of the difficulties with Washington Mutual. Pls.' Resp. to Defs.' 1st Disc. Req. at 3, R. 121-79 (Exhibit D therein).

Plaintiffs then contacted other lenders. Those lenders, however, "wanted [Plaintiffs] to put up a big proposal on how . . [they would] make money farming." R. 880:25:12-15. And, Plaintiffs "don't have any experience farming." R. 880:44:20-21.

"[Ty then] started mentioning to [James] different financing options. And the lease option was one of them." R. 880:25:19-20. Ty acknowledged that, at first, James exhibited little amenability to the lease option, describing James's level of "interest" as "not much." R. 880:25:21-25. James, however, did later agree to discuss proposed terms of a lease option, R. 880:26:7-9, and a written "lease option[, dated October 5, 2004,] that [Ty] prepared . . . [was] sen[t] to Jim to look over." R. 880:26:14-15, 21. From that point on, the REPC was no longer pursued by the parties. R. 880:47:20.

Ty admitted that when Plaintiffs referred to closing, they were "really talking about . . . having [the Farnsworths] accept th[e] lease agreement." R. 880:47:25-48:4. Indeed, Plaintiffs conceded that after "commenc[ing] negotiating the lease option agreement, . . . [they] abandoned their efforts to secure conventional financing," Second Am. Compl. ¶ 13, R. 467-473, and, at the TRO hearing, Ty was asked, "as of October fifth, you had replaced your real estate purchase contract with Exhibit Two, the lease[?]" R. 880:47:17-18. He responded: "Yes. That's what I thought was happening." R. 880:47:20.

After receiving the Proposed Lease, which Plaintiffs prepared and sent to him, James "suggest[ed] . . . amendments to the[] terms" of it. R. 880:27:14-18. The proposed lease, which remained the subject of negotiations until November 1, 2004, was never signed by the Farnsworths nor was it returned to Plaintiffs. R. 880:47:1-5.

Ty testified, at the temporary injunction hearing, that Defendants did not accept the offer for the lease option by November 1, 2004. R. 880:48:10-12. Ty further conceded that, "[o]ther than the earnest money, [he] never tendered any money" for the REPC. R. 880:49:1-13.

Sometime in the last few days of October, following the expiration of the REPC on October 24, 2004, James learned from Gerald Wilkerson, a real estate agent, that a Shane Gardner was interested in the property and then, a few days later that two other potential buyers wished to acquire the property. J. Farnsworth Dep. at 86:11-87:11, R. 121-79. On or about November 8, 2004, Defendants informed Plaintiffs of one of the offers and gave Plaintiffs the opportunity to match it. J. Farnsworth Dep. at 92:15-25; 94:8-14, R. 121-79. Plaintiffs did not match the offer and the property was sold to Byron Gibson, on November 12, 2004. J. Farnsworth Dep. 104:18-19, R. 121-79. Plaintiffs then sued.

SUMMARY OF ARGUMENTS

1. Plaintiffs, under oath, testified that they did not perform under the REPC, that the terms of the lease option were never agreed to and that the lease option was never signed by Defendants. The trial court properly granted summary judgment on Plaintiffs' Second Amended Complaint on those undisputed facts.

2. The trial court correctly denied Plaintiffs' request for specific performance, where Plaintiffs admitted that they abandoned the REPC, that they did not tender the performance required by the REPC, that the lease option terms were not agreed upon and that the agreement was never signed by Defendants.

3. The statute of frauds barred Plaintiffs' attempt to enforce a proposed lease agreement that Defendants never accepted nor signed. Defendants did not unequivocally indicate that they would not invoke the statute of frauds as a defense. Indeed, Plaintiffs prepared a written offer for a proposed lease option. The parties clearly anticipated a written agreement.

4. As to Plaintiffs' fourth, fifth and sixth points, the trial court properly exercised its discretion when it refused to allow Plaintiffs, pursuant to Rule 15, to amend their complaint a third time to include breach of contract, breach of good faith and fair dealing and other claims after the court had already dismissed the second amended complaint.

5. Utah Code Ann. § 78-40-2.5, which sets forth the procedure to obtain the release of a lis pendens, is not unconstitutionally violative of due process, as it affords an opportunity to be heard and does not bar the granting of a stay pending appeal.

6. Plaintiffs are not entitled to recover their attorney fees, as they were not the prevailing party and because they do not address on appeal their claim of fraud, which was listed in their complaint as the sole basis for enforcement of the REPC (which contains the attorney fees provision).

Defendants' Cross-Appeal

1. The trial court erred when it ruled that the lis pendens placed on Defendants' property was not a wrongful lien where Plaintiffs' claims were frivolous. Plaintiffs sought enforcement of the Proposed Lease, which was not enforceable under the statute of frauds. Further, following the temporary injunction hearing, where it became clear Plaintiffs did not tender their performance under the REPC and had abandoned the REPC, Plaintiffs nevertheless refused to release the lien, despite notice from Defendants of the lien's wrongful nature.

2. Defendants are entitled to reimbursement of their legal fees, based on the language of the REPC, incurred both at the trial court and on appeal for having to defend against Plaintiffs' efforts to enforce the REPC.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BASED ON THE PLAINTIFFS' OWN TESTIMONY. PLAINTIFFS' EFFORTS TO CHALLENGE SUMMARY JUDGEMENT BY AMENDING THEIR COMPLAINT AND ENLARGING AND CHANGING THEIR TESTIMONY SHOULD NOT BE ALLOWED BY THE COURT.

The material and essential facts were testified to by Plaintiffs at the injunction hearing on November 29, 2004. At that hearing, they admitted their difficulty in obtaining financing to close the purchase, R. 880:24:21-24,25:12-15,25:19-20, and their subsequent abandonment of the REPC when they opted to attempt to negotiate a lease with option to purchase. R. 467-473; 880:47:20. After a month and a half, the terms of a lease option were never agreed to, R. 880:48:10-12, and Defendants sold the property to a third party. Based on those undisputed facts, summary judgment was appropriate in this case.

Rule 56(b) of the Utah Rules of Civil Procedure provides that "[a] party against whom a claim . . . is asserted may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." "The primary purpose of the summary judgment procedure is to pierce the allegations of the pleadings, show that there is no genuine issue of material fact, although an issue may be raised by the pleadings, and that the moving party is entitled to judgment as a matter of law." Dupler v. Yates, 10 Utah 2d 251, 269 (1960).

In this case, Plaintiffs sought enforcement of the REPC. However, in testimony at the TRO hearing and in their complaint, as outlined above, they conceded that they had difficulty obtaining financing, that they never tendered payment, and that they abandoned the REPC. Plaintiffs then filed their First and Second Amended Complaints calling for enforcement of the Proposed Lease under theories of promissory estoppel, fraud and waiver, and enforcement of the REPC under their fraud theory. R. 57, 467.

Defendants, after completion of discovery, filed their summary judgment motion, based primarily on Ty's testimony at the temporary injunction hearing. Plaintiffs responded with a barrage of facts requesting summary judgment on their Second Amended Complaint. Plaintiffs' facts were either attempts to refute the Plaintiffs' prior sworn testimony or were not material to the issues and were disputed by Defendants. For example, Defendants did not accept any offer for the lease option. The parties did not agree on a down payment, a purchase price, an interest rate, or a monthly payment, among other things. J. Farnsworth Dep. 46:5-16, 48:19-22, R. 421-66 (Exhibit A therein). James "talk[ed] to [Ty] about contacting an escrow company to handle payment under the lease option, if it was entered into." J. Farnsworth Dep. at 55:23-56:1, R. 421-66. Moreover, James did not express approval of Ty's working on the property. In fact, he asked Ty to cease from working on the property "after [he] found out [Ty] did it the first time." J.

Farnsworth Dep. at 57:14-58:2, R. 421-66. Additionally, Defendants did not lie about a realtor. James, with whom Plaintiffs negotiated, was not aware of David Farnsworth's communication with the realtor about the problem until after October 30, 2004, J. Farnsworth Dep. at 84:18-22, R. 421-66, and Plaintiffs concede that they verified the listing on October 29, 2004, "confirm[ing] Jim's story and ma[king] them feel at ease." Pls.' Facts ¶ 53, R. 419-20.

The trial court correctly concluded that, notwithstanding Plaintiffs' Gatling gun approach, they had not advanced material undisputed facts to avert summary judgment and that the material undisputed facts required dismissal of the Plaintiffs' complaint. In short, even when all Plaintiffs' facts were considered, they did not avert summary judgment on Plaintiffs' fraud, waiver and promissory estoppel claims.

Plaintiffs then attempted to assert new claims via post-summary-judgment motions, but the trial court properly rebuffed these efforts. Despite Plaintiffs' numerous motions and amendments attempting to cloud the facts and issues, this case, at its heart, is a simple case. Plaintiffs did not perform their obligations under the REPC and abandoned it. The parties then negotiated the terms of a Proposed Lease, but did not reach any agreement, and Defendants did not sign the Proposed Lease and, as a consequence, it was not enforceable under the statute of frauds.

II. PLAINTIFFS NEVER TENDERED PERFORMANCE UNDER THE REPC AND ARE NOT ENTITLED TO SPECIFIC PERFORMANCE THEREOF. THE

PROPOSED LEASE WAS NEVER AGREED TO AND WAS NOT SIGNED BY DEFENDANTS AND, THUS, SPECIFIC PERFORMANCE OF THE LEASE OPTION IS LIKEWISE NOT AVAILABLE.

Even though Plaintiffs failed to execute their duties under the REPC, they asked the trial court to grant specific performance of the REPC under a fraud theory (which they did not brief on appeal), or the Proposed Lease under theories of fraud, promissory estoppel and waiver. The trial court properly denied the requests.

"Neither party to an agreement 'can be said to be in default (and thus susceptible to a judgment for damages or a decree for specific performance) until the other party has tendered his own performance.'" Kelley v. Leudacia Fin. Corp., 846 P.2d 1238, 1243 (Utah 1992) (quoting Century 21 All W. Real Estate & Inv., Inc. v. Webb, 645 P.2d 52, 56 (Utah 1982)). Hence, in order to recover damages or to force specific performance, a party must tender. In the instant case, Plaintiffs did not tender their performance. The REPC settlement deadline was October 24, 2004. Addendum I. Appellants [sic] Brief, at 29, claims there were two other closing dates -- October 28, 2004 and November 1, 2004. Id. at 29, 34. These dates are not listed in the Second Amended Complaint, which states that "[t]he time set forth in the Contract to close, October 24, 2004, ha[d] passed," R. 467-473, ¶ 5. Plaintiffs further assert that they tendered their performance via a letter dated November 9, 2004. Appellants [sic] Br. at 29. There was no closing date other than October 24th set forth in the REPC (Addendum I), and there was

no closing date for the proposed lease. R. 880:47:25-48:4. Nevertheless, even assuming that Plaintiffs' new, and inconsistent, closing dates were valid, Plaintiffs did not, by their own statement of the facts, "tender" until after the date set for closing under either scenario, as November 9th falls after both dates.

Moreover, Plaintiffs' November 9th letter did not constitute a tender. Plaintiffs invoke Utah Code Ann. § 78-27-1 for the proposition that the letter expressing a willingness and ability to close the contract was sufficient to meet the tender requirement. Appellants [sic] Br. at 29. However, as this Court explained in Shields v. Harris, while

> Section 78-27-1 . . . provides that "an offer in writing to pay a particular sum of money . . . is, if not accepted, equivalent to the actual production and tender of the money[,]" Utah courts have interpreted this provision to mean a valid tender requires an "obligor to make a bona fide, unconditional, offer of payment of the amount of money due coupled with an actual production of the money or its equivalent." "It is not enough to simply inform the seller that the buyer is ready and willing to perform the contract as planned."

934 P.2d 653, 655 (1997) (emphasis added) (citations omitted); see also Carr, 781 P.2d at 1295 ("Without the formal act of tender, . . . [the Court is] left having to speculate about how [defendants] might have responded. Avoidance of such guesswork is one of the primary benefits of actually tendering one's performance and is a sound reason for rather strict adherence by the courts to the tender requirement.").

Not only did Defendants neglect to tender the purchase price, Plaintiffs also did not obtain loan approval prior to the REPC's expiration. This is significant, because, as in Carr, "the subject-to-financing clause [of the REPC] was a condition precedent which [Plaintiffs] w[ere] obligated to satisfy . . . . Since [t]he[y] failed to do so, . . . [Defendants] w[ere] excused from [their] obligations under the contract." 781 P.2d at 1293. Hence, Defendants, like the defendants in Carr, "'w[ere] excused from performing [their] duties under the contract by reason of [P]laintiff[s]' conduct, especially [P]laintiff[s]' failure to secure financing . . . .'" Id. at 1295. Even assuming that none of the parties tendered, "[w]here the contract states[, as in the case at hand,] that time is of the essence, cases hold that both parties are discharged from their contract obligations if neither makes tender by the agreed closing date." Webb, 645 P.2d at 55 n.1.

Plaintiffs failed to tender their obligations, including a condition precedent, and their failure was not excused. Indeed, tender is excused only when it would be truly fruitless, such as "where the lienor states that he or she does not intend to accept payment, where the lienor claims a larger sum that he or she is entitled to collect, and where the lienor has coupled the legitimate claim with another claim." Jenkins v. Equipment Ctr., Inc., 869 P.2d 1000, 1003 (Utah Ct. App. 1994) (citations omitted). None of these facts is present in the instant case. There is simply

no evidence that Defendants would not have accepted timely payment of the purchase price, and Defendants did not require a sum greater than the purchase price, but, rather, afforded Plaintiffs the opportunity to match a higher offer for the parcel only after the REPC expired. J. Farnsworth Dep. at 92:15-25; 94:8-14, R. 121-79. Defendants, therefore, are not "susceptible to a judgment for damages or a decree for specific performance." Kelley, 846 P.2d at 1243.

III. DEFENDANTS NEVER AGREED TO WAIVE THE REQUIREMENTS OF THE STATUTE OF FRAUDS AND THEREFORE PROMISSORY ESTOPPEL CANNOT BE USED TO CREATE A LEASE OPTION THAT WAS NEVER AGREED TO BY THE PARTIES.

Utah law is clear. To be binding, agreements for the purchase or lease of real estate must be written and executed by the seller.

> Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made . . . .

Utah Code Ann. § 25-5-3. What is more, "[i]t is settled law that a modification of a contract must be in writing if the contract that is modified must be in writing under the Statute of Frauds." SCM Land Co. v. Watkins & Faber, 732 P.2d 105, 108 (Utah 1986).

In SCM, the court confirmed these precepts, when it confronted a situation that resembles the one at hand. The plaintiff, in that case, "executed a . . . lease agreement," id. at 106, but then argued that the defendant "orally promised . . . that [he could expand into . . . [additional] space" not covered by the written

terms of the parties' contract. Id. In rendering its decision, the court "assume[d] for purposes of discussion that [the defendant] and [the plaintiff] made an oral agreement." Id. at 107. Nevertheless, the court held that "[the plaintiff's] failure to obtain whatever promise or agreement it had with [the defendant] in writing made th[e] agreement unenforceable under the Statute of Frauds." Id.

In explanation, the court stated that "any modification of [the lease] . . . must be in writing." Id. at 108. The court further indicated that if the oral agreement were considered on its own, rather than as a modification, that it would likewise fail, because "[a]n agreement to enter into a future real estate lease for a period longer than a year is within the Statute of Frauds, and must be in writing to be enforceable." Id. at 107.

In the present case, although there was no oral agreement for a lease, even assuming that an oral lease option existed, such an agreement would not bind the parties. Whether evaluated as a separate contract or as a modification of the REPC, the Proposed Lease was not in writing and was not executed by Defendants.

Reliance on promissory estoppel does not alter this result. As this Court explained in Stangl v. Ernst Home Center, 948 P.2d 356, 360-61 (Utah Ct. App. 1997), where real property is "involv[ed],"

> Utah cases have narrowly circumscribed the application of promissory estoppel to the statute of frauds. A defendant is estopped from asserting the statute of frauds as a

> defense only when he or she has expressly and unambiguously waived the right to do so.

In other words, "[p]romissory estoppel bars . . . asserti[on] [of] the statute . . . only where the party has clearly and unequivocally represented that it would not use it as a defense." Id. at 365-66. Thus, "a mere promise to execute a written contract and a subsequent refusal to do so is insufficient to create an estoppel, although reliance is placed on such a promise and damage is sustained as a consequence of the refusal," McKinnon v. Corp., Etc., Latter-day Saints, 529 P.2d 434, 436-37 (Utah 1974), even if "[t]he parties [have] agreed on lease terms and . . . 'promised to have the lease agreement drawn up.'" Stangl, 948 P.2d at 361 (quoting Easton v. Wycoff, 295 P.2d 332, 333 (Utah 1956)).

Identifying the policy underpinning enforcement of the statute of frauds in real estate cases, the Court explained:

> If this court were to reject prior Utah case law . . ., parties to a contract negotiation could not rely on the protections afforded by the statute of frauds, thereby "eviscerating" it. Moreover, contract negotiators would never know at what point mere negotiations became a binding contract. Parties to contract negotiations should be entitled to rely on the statute of frauds absent a clear manifestation of intent to claim no reliance. A party concerned about the assertion of the statute of frauds could easily protect itself by demanding written commitments before acting in reliance on the negotiations.

Id.

In the instant case, Plaintiffs enumerate "a plethora of fact[s] . . ., but none involves conduct on the part of the

defendant[s] that is tantamount to a representation that [they] would not avail [themselves] of the Statute of Frauds." McKinnon, 529 P.2d at 437. Hence, Plaintiffs' facts, even if true, do not warrant promissory estoppel. Neither party contests that the REPC clearly stated that any amendment thereto had to be in writing, ¶ 6, and all the parties anticipated that the proposed lease had to be in writing. That is, after all, why Plaintiffs sent the written lease to Defendants for their signatures. R. 880:26:14-15, 21. In this case, promissory estoppel cannot defeat the statute of frauds, because there is simply no evidence that Defendants "clearly and unequivocally represented that [they] would not use [the statue of frauds] as a defense." Stangl, 948 P.2d at 365-366.

IV. THERE WAS NO BREACH OF CONTRACT BY DEFENDANTS AND THE CLAIM FOR DAMAGES WAS NOT TIMELY. THEREFORE, THE COURT PROPERLY DENIED THE REQUEST FOR DAMAGES.

Plaintiffs made no breach of contract claim in their amended complaints. Rather, they sought to add the claim by seeking to file a Third Amended Complaint after the entry of summary judgment. Defendants' objected to Plaintiffs' raising of the claim after the trial court had already granted summary judgment against Plaintiffs, and the trial court rightly denied the request to amend for a third time.

Nevertheless, even if Plaintiffs were allowed to initiate a new claim after entry of summary judgment, they are not entitled to damages, because, as previously noted, "[n]either party to an

agreement 'can be said to be in default (and thus susceptible to a judgment for damages or a decree for specific performance) until the other party has tendered his own performance.'" Kelley, 846 P.2d at 1243 (quoting Webb, 645 P.2d at 56) (emphasis added).

In the instant case, Plaintiffs did not tender their performance. They did not obtain financing (a condition precedent to the enforceability of the REPC), and they did not otherwise perform under the contract. Indeed, they set aside the REPC when they started negotiating a lease option.

V. PLAINTIFFS DID NOT TIMELY RAISE THEIR CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING AND THERE CAN BE NO BREACH WHERE PLAINTIFFS FAILED TO PERFORM UNDER THE CONTRACT AND DEFENDANTS ONLY EXERCISED THEIR LEGAL AND CONTRACTUAL RIGHTS.

In a fashion similar to their breach of contract claim, Plaintiffs first propounded a claim for breach of the covenant of good faith and fair dealing after the trial court granted summary judgment on the claims in their complaint. Plaintiffs raised the claim in a motion for reconsideration. Such a motion is not recognized by the Court, Radakovich v. Cornaby, 2006 UT App 454, ¶ 5, and this claim should not be entertained by the Court.

"[E]ven if the issue were properly before this court, there is no violation of the duty of good faith, as a matter of law, when a party is simply exercising its contractual rights." Heiner v. S.J. Groves & Sons Co., 790 P.2d 107, 115 (Utah Ct. App. 1990). Defendants did act in good faith. They had no obligation to agree

to and sign the Proposed Lease unless the terms were satisfactory. When Plaintiffs allege Defendants would not close, by Plaintiffs' own sworn testimony, that means Defendants would not agree to the terms of the Proposed Lease. R. 880:47:21-48:4. Additionally, Defendants did not lie about a realtor problem. James, with whom Plaintiffs negotiated, was not aware of David's communication with the realtor about the problem until after October 30, 2004, J. Farnsworth Dep. at 84:18-22, R. 421-66, and Plaintiffs concede that they verified the listing on October 29, 2004, "confirm[ing] Jim's story and ma[king] them feel at ease." Pls.' Facts ¶ 53, R. 419-20. Hence, their accusations of dishonesty are somewhat perplexing.

After October 24, 2004, the REPC expired by its own terms. Thus, any attempt to delay a closing thereafter was unnecessary. And, Plaintiffs were awaiting Defendants' acceptance of the proposed lease by November 1st, the expiration date of Plaintiffs' offer for a lease option. R. 880:48:10-12; 46:17-20; 47:21-48:4. There simply was no contract to close after October 24, 2004, and there was no breach of the covenant of good faith and fair dealing.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REJECTING PLAINTIFFS' ATTEMPT TO AMEND THEIR PLEADINGS, FOR A THIRD TIME, UNDER RULE 15, WHEN THE COURT HAD ALREADY GRANTED SUMMARY JUDGMENT, THEREBY DISMISSING PLAINTIFFS' COMPLAINT.

Plaintiffs, citing Rule 15(b) of the Utah Rules of Civil Procedure (Rule 15(b)), asked the trial court to conform their complaint to the evidence, apparently meaning the list of facts in

their motion for summary judgment, as well as to conform their complaint to allow claims raised after summary judgment. Rule 15(b) provides that "when issues not raised by the pleading are tried by the express or implied consent of the parties, they shall be treated . . . as if they had been raised in the pleadings."

Whether Rule 15(b) may be invoked when there has not been a trial is a matter of disagreement. Blinn v. Beatrice Cmty. Hosp. & Health Ctr., 270 Neb. 809, 816 (2006). No Utah authority seems to directly address this issue, although one decades-old case, without analysis, appears to apply Rule 15(b) to circumstances in which the court granted summary judgment. Hallstrom v. Buhler, 14 Utah 2d 111 (1963). Clearly, however, the plain language of the rule requires a matter to be "tried" and makes reference to "the trial," Utah R. Civ. P. 15(b), leading one court to opine, "Rule 15(b) allows a court to revise pleadings to conform to the case as it actually was litigated at trial. The present case did not go to trial; it was decided on motions for summary judgment. Therefore, the situation which Rule 15(b) addresses simply did not arise in the present case."" Crawford v. Gould, 56 F.3d 1162, 1168-69 (9th Cir. 1995).

Moreover, even if Rule 15(b) may be appropriately applied in the instant case, the trial court nevertheless properly denied Plaintiffs' motion to amend, because Defendants did not consent to consideration of issues outside the complaint and would have been prejudiced by consideration of them. Rule 15(b) is clear that its

use is limited to situations in which "issues . . . are tried by express or implied consent of the parties."

> "Express consent may be found when a party has stipulated to an issue or the issue is set forth in the pretrial order.
>
> Implied consent may arise in two situations. First, the claim may be introduced outside of the complaint - in another pleading or document - and then treated by the opposing party as if pleaded. Second, consent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to that issue.
>
> Implied consent may not be found if the opposing party did not recognize that new matters were at issue during the trial. The pleader must demonstrate that the opposing party understood that the evidence in question was introduced to prove new issues. . . .
>
> [Hence,] A court may not find consent when evidence supporting an issue allegedly tried by implied consent is also relevant to other issues actually pleaded and tried."

Blinn, 270 Neb. at 817 (quoting 3 James Wm. Moore et al., Moore's Federal Practice § 15.18[1], at 15-75 to 15-77 (3d ed. 2005)) (emphasis removed). In short, "[t]o satisfy rule 15(b), evidence to which no objection is raised must be directed solely at the unpleaded issue, in order to provide a clear indication that the opposing party would or should have recognized that a new issue was being injected into the case." Blinn, 270 Neb. at 819.

"Once a party objects to evidence at trial on the ground that it is outside the issues raised in the pleadings, . . . the second

rule 15(b) provision . . . applies." Fibro Trust, Inc. v. Brahman Fin., 974 P.2d 288, 291 (Utah 1999). In these circumstances,

> [t]he trial court's discretion to grant amendment of the pleadings is conditioned on the satisfaction of two preliminary requirements: a finding that the presentation of the merits will be subserved by amendment and a finding that admission of such evidence would not prejudice the adverse party in maintaining his action or defense on the merits.

Id. at 291 (quoting England v. Horbach, 944 P.2d 340, 345 (Utah 1997)).

In Fibro, "Brahman[, not unlike Plaintiffs,] argue[d] that the parties raised . . . [an] issue by implied consent because Fibro argued [about it] in its trial brief." 974 P.2d at 292. The court observed, "[h]owever, [that] Fibro also objected to the court's consideration of . . . [the issue] in that same trial brief," id., "during trial," id., and "post-trial." Id. As an "example [of a ground for denying amendment], . . . [the court stated that] Fibro m[ight] be able to establish that amendment would prejudice it because it had conducted discovery prior to . . . [the] raising [of the issue] and therefore had not focused discovery efforts on the . . . issue." Id. n.1.

In the case at hand, Plaintiffs attempted to add several claims to their complaint, following the trial court's ruling on summary judgment and after the court permitted them to twice amend their complaint prior to summary judgment. These claims included breach of the covenant of good faith and fair dealing,

misrepresentation, specific performance and breach of contract. Defendants did not either expressly or impliedly consent to consideration of these issues. Indeed, as outlined in Defendants' Memorandum in Opposition to Plaintiffs' Motion to Conform the Complaint to the Evidence, Defendants strenuously objected to their tardy introduction. R. 649-60.

Indeed, whenever it was apparent that Plaintiffs were attempting to introduce new claims (including those not briefed on appeal), Defendants consistently objected. After all, "[R]ule [15(b)] does not exist simply to 'allow parties to change theories mid-stream.'" Kovacevich v. Kent State Univ., 224 F.3d 806, 831 (6th Cir. 2000) (quoting Donald v. Wilson, 847 F.2d 1191, 1198 (6th Cir. 1988)).

Plaintiffs opted, for whatever reason, not to make certain claims they later wished to utilize. Defendants would clearly have been prejudiced by a decision to allow amendment, having prepared a case with defenses and discovery based upon the claims supplied in the First and Second Amended Complaints, and having successfully obtained summary judgment thereon.

> While rule 15 "permits the amendment of pleadings by the court, . . . the rule is to be applied with less liberality when the amendments are proposed during or after trial, rather than before trial. In any event, the granting of leave to amend is a matter which lies within the broad discretion of the [trial] court."

Brown v. Jorgensen, 136 P.3d 1252, 1259 (Utah Ct. App. 2006) (citations omitted). In the instant case, as in Brown, it could

fairly be said that "[t]he trial court denied the . . . [Plaintiffs'] motion and concluded that . . . [Plaintiffs] had ample opportunity to amend their pleadings much earlier and that 'it would be fundamentally unfair to allow . . . [Plaintiffs] to . . . seek recovery of a different sort," id. (quoting the trial court), after the trial court granted summary judgment, particularly where the only new claim analyzed in Plaintiffs' summary judgment memorandum (aside from the three claims in the complaint) was a call for specific performance, which the trial court denied in its order on summary judgment.

In other words, Plaintiffs not only asked for amendment based on arguments that were not in the first three complaints, but also, in large part, asked for amendment based on claims introduced in filings, such as their motion for reconsideration, that followed the trial court's ruling on summary judgment. Even under a very generous reading, Rule 15(b) does not, by its plain language, allow a court to amend a complaint to allow claims raised after the completion of trial to be deemed pleaded. Though the amendment may take place after trial, the initial raising of the claims may not. The trial court properly denied the motion.

VII. UTAH CODE ANN. §78-40-2.5 GOVERNS THE RELEASE OF LIS PENDENS, AND THE SAME IS NOT UNCONSTITUTIONAL.

Utah Code Ann. § 78-40-2.5 sets forth the procedure to obtain a release of a notice of lis pendens even when a case is pending. The statute provides that "a party to the action, can ask the court

to release a lis pendens at "any time after a notice has been recorded." Utah Code § 78-40-2.5(2) (emphasis added). The statute then states that "[a] court shall order a notice released if . . . (a) the court receives a motion to release . . . ; and (b) the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim . . . ." Utah Code § 78-40-2.5(3).

Plaintiffs filed a notice of lis pendens when they filed this action. The trial court then granted summary judgment and dismissed all Plaintiffs' claims. Because Defendants filed the requisite motion and Plaintiffs did not establish the viability of their claim, the trial court granted Defendants' motion. R. 838-42.

Plaintiffs, for the first time on appeal, challenge the constitutionality of that statute on a basis other than that it infringes upon due process rights in terms of its interference with the right to appeal. R. 741-46. This issue may also be moot since the trial court issued a stay on November 21, 2006. R. 876. If the Court decides to address this issue, then, as an initial point, Plaintiffs "bear a heavy burden," State Ex Rel. Z.C., 128 P.3d 561, 564 (Utah Ct. App. 2005), because courts of this state "are guided by the rule that "while ruling on the constitutionality of a statute, [they] will resolve doubts in favor of constitutionality.'" Id. (quoting State v. Mohi, 901 P.2d 991, 995 (Utah 1995)). Indeed, "[i]t is . . . one of the important functions

of the Legislature to change and modify the law . . . ," Berry v. Beech Aircraft, 717 P.2d 670, 676 (Utah 1985), and "due process . . [does not] constitutionalize[] the common law or otherwise freeze[] the law." Id.

Plaintiffs were not denied due process under the statute. They had an opportunity to present arguments on the motion, and there is nothing in the statute that prohibited the Plaintiffs from appealing the decision of the trial court, and, thus, there is no abridgement of any right to appeal, or to seek a stay pending appeal. Although, as this Court noted, Plaintiffs may have erred when they did not bring a separate appeal, as the attempt to remove the lis pendens could be deemed an enforcement action. R.852-53. Any such appeal would now be untimely, and no stay could issue.

The legislature's aim to expedite release of an unsupported lis pendens is a worthy one. The damages suffered by maintenance of the notice in this case include possible loss of the sale and the proceeds from that sale to Gibson and interest on the purchase price. The longer the lis pendens remains, the greater the risk to Defendants.

VIII. PLAINTIFFS ARE NOT THE PREVAILING PARTIES AND ARE NOT ENTITLED TO RECOVERY OF THEIR FEES.

In this case, Plaintiffs sought to enforce the Proposed Lease under the theories of fraud, waiver and promissory estoppel, and, secondarily, the REPC under the fraud theory. Second Amended Complaint ¶¶ 32-38, R. 467-73. A request was made for fees in the

Second Amended Complaint, but that claim, which was not pursued further prior to summary judgment, is now raised on appeal. Plaintiffs do not argue their fraud theory on appeal. Thus, they did not and cannot prevail on enforcement of the REPC. Since they are not the prevailing party, they cannot recover fees under the REPC's terms.

CROSS-APPEAL

IX: THE FILING OF THE LIS PENDENS WAS IN BAD FAITH AND THE REFUSAL TO RELEASE IT CONSTITUTES A WRONGFUL LIEN.

On this issue, the Defendants invite the Court to adopt the approach of Florida in assessing whether a lis pendens, filed when a claim is without merit, is a wrongful lien. In India America Trading, Co. v. White, 896 So. 2d 859, 859 (Fla. App. 3 Dist. 2005), "India America executed a written offer to purchase 120 acres of real property from Wesley White." The offer required acceptance by a certain date, and White did not accept the offer thereby. Id. "When White refused to sell the real property to India America," id., India America brought breach of contract and fraud claims. Id.

The court surmised, however, that "even if White had orally agreed to sell the real property to India America, the oral contract would have been unenforceable pursuant to . . . [the] statute of frauds." Id. at 860. The court further observed that "even though the defendant may not have intended to perform the oral contract at the time when he made the oral promise, the action

for fraud and deceit could not be maintained based on the statute of frauds." Id. at 361.

Thus, the court opined that "India America's fraud count [wa]s nothing more than an action to enforce an oral contract for the sale of land and therefore, d[id] not constitute a good faith, viable claim necessary to support a lis pendens." Id. Addressing the issue of reliance, the court stated:

> India America alleged that [it] relied on White's misrepresentation that he would sell the real property to India America. However, the record, which includes the written offer, contradicts this allegation. Specifically, the written offer provides that the contract is not binding unless accepted and delivered to White before a specific date. Therefore, by the terms of its offer, India America could not have believed that it had a binding contract based upon their oral communications.

Id.

Similarly, in the case at hand, Plaintiffs abandoned the REPC and then submitted the Proposed Lease which required acceptance by November 1, 2004. Proposed Lease, Addendum J, ¶ 16. Ty acknowledged that Defendants did not accept the lease option by November 1, 2004. R. 880:48:10-12. Plaintiffs argue that their case is not frivolous. In White, however, the court came to the opposite conclusion on similar facts (though there was no oral contract in the instant case), writing that the "action to enforce an oral contract for the sale of land . . . d[id] not constitute a good faith, viable claim necessary to support a lis pendens." 896 So. 2d at 861.

In Utah, the wrongful lien statute provides that it "[does] not prevent a person from filing a lis pendens." Utah Code § 38-9-2(2). The Utah Supreme Court has, however, expounded that a "[lis pendens'] only foundation is the action filed - it has no existence independent of it." Hansen v. Kohler, 550 P.2d 186, 190 (1976). Moreover, "[i]n Utah, a lis pendens may only be filed in connection with an action (1) 'affecting the title' to real property, or (2) 'affecting . . . the right of possession of real property.'" Winters v. Schulman, 977 P.2d 1218, 1223 (Utah Ct. App. 1999) (quoting Utah Code § 78-40-2). "'Utah law does not allow for the filing of a lis pendens in cases seeking a money judgment.'" Winters, 977 P.2d at 1224 (quoting Busch v. Doyle, 141 B.R. 432, 436 (Bankr. D. Utah 1992)).

It was, therefore, improper for Plaintiffs to file a lis pendens when they could not compel specific performance of the REPC having not performed under the same. Similarly, as in White, the filing of a lis pendens in this case, based upon an unaccepted proposal, was likewise wrongful. Indeed, although the right to file a lis pendens seems quite broad under the statute, it seems improbable that legislators intended to allow any lis pendens, though technically an allowable filing, to be permissible, if it was premised upon a frivolous filing.

Additionally, in the instant case, the trial court found, based on the testimony of Plaintiffs at a hearing on November 29,

that the REPC was not enforceable, that the purchase price had not been tendered and that the closing date had not been met. R. 47-50. Following that hearing, a notice was given to Plaintiffs, by a letter dated December 22, 2004, requesting that their lis pendens be released and explaining that the filing of the lis pendens was wrongful, especially in light of the trial court's findings and ruling. R. 522-33 (Exhibit A therein). Plaintiffs refused to release the lis pendens.

Utah Code Ann. § 38-9-4 provides that if a person refuses to release a wrongful lien, he or she is liable for treble damages and reasonable attorney fees and costs. In this case, once the court ruled that the REPC was not enforceable, Plaintiffs had a duty to release the lis pendens. A refusal to do so was wrongful, and Defendants should be awarded treble damages together with their attorney fees and costs.

Plaintiffs request that this Court rule, as did the Florida court, that a good faith claim must underpin a lis pendens. In this case, the REPC was unenforceable and the trial court so ruled in December 2004. The proposed lease was likewise unenforceable as the terms were never agreed upon and the document was never signed by Defendants. Plaintiffs filed the lis pendens to try to prevent Defendants from selling the property, which was an improper motive. Defendants are entitled to the damages incurred because of the improper filing.

X. DEFENDANTS, AS THE PREVAILING PARTIES, ARE ENTITLED TO REIMBURSEMENT OF THEIR LEGAL FEES AND COSTS.

The trial court awarded Defendants the fees they incurred in defending against the injunction request, based on the terms of Rule 65A regarding preliminary injunctions. The court, however, denied the request for additional fees under the terms of the REPC, finding that the REPC had been abandoned by the parties. R. 661-69. At first blush, the result may seem correct, until one realizes the policy such a result begets, where, as in this case, Plaintiffs continue to attempt to enforce the REPC, including on this appeal, and Defendants have to defend against those claims.

"'In Utah, attorney fees are awarded only if authorized by statute or contract. If provided for by contract, attorney fees are awarded in accordance with the terms of that contract.'" Panos v. Olsen and Assoc. Constr., Inc., 123 P.3d 816, 822 (Utah Ct. App. 2005)(quoting Foster v. Montgomery, 82 P.3d 191, 194 (Utah Ct. App. 2003)). Paragraph 17 of the REPC at issue provides: "In the event of litigation . . . to enforce the Contract, the prevailing party shall be entitled to costs and reasonable attorney fees."

In this case, Plaintiffs sought to enforce the REPC under a fraud theory. Second Amended Complaint ¶¶ 32-38, R. 467-473. They have also, following summary judgment, sought damages for breach of that contract. Hence, although Plaintiffs efforts were generally focused on having the court bind Defendants to the Proposed Lease, to which they had not agreed and which they were still negotiating,

Plaintiffs did allege that the REPC should be enforced under the fraud theory to which Defendants had to mount a successful defense, and Defendants continue to have to set forth arguments against Plaintiffs' claims raised both before and after summary judgment.

Carr buttresses the conclusion that Defendants should be awarded their attorney fees. In Carr, the plaintiff requested specific performance of a purchase contract. This Court upheld the trial court's decision denying specific performance, due to nonperformance of contract terms by the plaintiff. 781 P.2d at 1296. The Court then addressed the issue of attorney fees. Id.

The fees provision in the contract stated: "'If either party fails to perform, he agrees to pay all expenses of *enforcing this agreement*, or of any right arising out of the breach thereof, including a reasonable attorney's fee.'" Id. (Emphasis in original). The Court, applying this language, concluded that Smith was not entitled to attorney fees, because "Smith took an entirely defensive posture and was not enforcing any right arising under the agreement or arising from a breach thereof." Id.

However, while the Court determined that "[Smith] [wa]s not entitled to attorney fees under the provision at issue," id., because the provision was "not comprehensive but . . . limited in scope," id., the Court proclaimed that "Smith would surely be entitled to attorney fees under the more typical provision awarding fees to the prevailing party." Id. Supplying an example of such a

proviso, the Court referred to Mountain States Broadcasting Co. v. Neale, 776 P.2d 643 (Utah Ct. App. 1989). Id. The attorney fee section of the agreement in this case and the provision in Neale are almost identical.

The Neale provision reads: "In the event of commencement of suit by either party to enforce the provisions of this agreement, *the prevailing party* shall be entitled to receive attorney's fees and costs . . . ." 776 P.2d at 648 (emphasis in original). Similarly, the REPC in the instant case states: "In the event of litigation . . . to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees." Addendum I, ¶ 17.

Neale also offers this straightforward insight: "[T]ypically, determining the 'prevailing party' for purposes of awarding fees and costs is quite simple. Plaintiff sues defendant; if plaintiff is awarded a judgment, plaintiff has prevailed, and if defendant successfully defends and avoids an adverse judgment, defendant has prevailed." Id. at 648. In this case, as outlined above, Plaintiffs did not receive their requested relief. Defendants, meanwhile, have "successfully defend[ed]." Id.

Nevertheless, the trial court concluded that no fees could be awarded because the contract became unenforceable due to nonperformance and abandonment by the parties. R. 661-669. However, in Carr, the defending party's "position . . . was that there was

no viable contract left to enforce." Id. at 1296. Yet, this Court averred that "Smith would surely be entitled to attorney fees under the . . . typical provision awarding fees to the prevailing party." Id. This result promotes a policy that protects parties who must defend against an otherwise unenforceable contract, and holds accountable parties who seek to enforce an otherwise unenforceable contract. Without such a policy, a party who successfully defends in a contract action might never be able to recover fees.

Finally, Defendants are not only entitled to attorney fees for proceedings before the trial court, but also before this Court, should Defendants prevail on appeal, in accordance with the REPC's terms. Panos, 123 P.3d at 822 (Utah Ct. App. 2005) (awarding fees on appeal under a like provision). Thus, Defendants respectfully request that this Court reverse the trial court's decision as to attorney fees, and award Defendants the fees incurred before the trial court and this Court to defend against Plaintiffs' action.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the trial court's decision granting summary judgment for the Defendants, thereby dismissing the Plaintiffs' Second Amended Complaint, be sustained, that the trial court's ruling as to wrongful lien be reversed and that the case be remanded with

direction to award Defendants the attorney fees and costs incurred before the trial court and on appeal.

Dated this 27 day of November 2006.

ALLRED & McCLELLAN, P.C.
Attorneys for Appellee

By: _____
Clark B Allred

By: _____
Brad D. Brotherson

ADDENDUM

A. Utah Code Ann. §38-9-4
B. Excerpts from Transcripts of Temporary Injunction Hearing November 29, 2004
C. Ruling and Order, January 11, 2006
D. Ruling and Order, March 29, 2006
E. Order, April 26, 2006
F. Ruling, May 15, 2006
G. Ruling and Order, August 16, 2006
H. Ruling and Order, November 21, 2006
I. Real Estate Purchase Contract, August 27, 2004
J. Residential Lease With Option to Purchase, October 5, 2004

ADDENDUM A

ADDENDUM

Utah Code Ann. §38-9-4
Civil liability for filing wrongful lien - Damages

(1) A lien claimant who records or files or causes a wrongful lien as defined in Section 38-9-1 to be recorded or filed in the office of the county recorder against real property is liable to a record interest holder for any actual damages proximately caused by the wrongful lien.

(2) If the person in violation of this Subsection (1) refuses to release or correct the wrongful lien within ten days from the date of written request from a record interest holder of the real property delivered personally or mailed to the last-known address of the lien claimant, the person is liable to that record interest holder for $1,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs.

(3) A person is liable to the record owner of real property for $3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs, who records or files or causes to be recorded or filed a wrongful lien as defined in Section 38-9-1 in the office of the county recorder against the real property, knowing or having reason to know that the document:

(a) is a wrongful lien;
(b) is groundless; or
(c) contains a material misstatement or false claim

ADDENDUM B

Q. What is your current occupation?
A. We're self-employed. We own a carpet and upholstery cleaning business.
Q. You say we, you mean you and your wife?
A. My wife and I. Yes.
Q. And how long have you had the carpet cleaning and upholstery business?
A. This is the eighth year.
Q. Are you a real estate professional?
A. No.
Q. Do you have any college education in real estate?
A. None.
Q. Is your wife, excuse me, did you say your wife works with you in the business?
A. She does work with us. Yes.
Q. And did there come a time when you were looking for property in Duchesne County?
A. Yes.
Q. And tell us how you found the property.
A. I was searching the internet.
Q. And you found, describe what you found on the internet.
A. I found the ranch for sale in Neola.
Q. Did you contact anybody in regards to this?
A. Yes.

Q. Who did you contact?

A. I contacted Jim. He had his cell phone number on the website.

Q. And when did you make these contacts?

A. It was in late July or early August.

Q. And tell me the substance of your first conversation with Mr. Farnsworth.

A. I basically just asked him that I was interested in the property and wanted to go take a look at it. He gave me directions on how to drive out and find it and my wife and I drove out and found it and toured the property.

Q. At what time, did there come a time when you actually met with Mr. Farnsworth?

A. After we toured it we were real interested in it and it was more than we expected so we made arrangements to meet with him to get the key to the house. We met in Heber City and the next day we drove out and toured the inside of the house.

Q. And about when was this?

A. I believe that was on the fifteenth roughly. It was a Sunday that we drove up.

Q. About the fifteenth of August. Is that correct?

A. Of August.

Q. So you toured the property. You liked the property. Did you get back in touch with Mr. Farnsworth again?

A. The next time, yes. We talked on the phone back and

A. The date that he prepared it or signed it, looks like it was the twenty-fourth of August. And then we signed it a few days later.

Q. Okay. This happened at the end August. Did you have another meeting with Mr. Farnsworth after this time?

A. We met him at the property, and again it would have been on a weekend, and we walked through the property. He kind of showed me a little bit about the watering system. But mainly that was to clarify any of the personal property issues that we had.

Q. Did you discuss what personal property was going to go with the farm?

A. Yes.

Q. Give us some short idea of what was being included with the sale according to our understanding.

A. All of the furniture in the home. I mean dishes, you name it. Everything that was on the property including some of the farm equipment. A baler, hay-wagon, frother, four wheeler, three wheeler.

Q. Let me direct your attention to Plaintiffs Exhibit One. At the top there is an indication of an earnest money amount of a thousand dollars. Did you provide a check in the amount of a thousand dollars?

A. Yes.

Q. And where was that delivered?

A. I believe we sent it to Jim.

Q. And it says on here it was received by Basin Land and Title.

A. That's who the check was made out to That was the title company that we were working on.

Q. Okay. And then there's a description of the property and then a short description of some excluded items.

A. Yes.

Q. If you go down to paragraph two, there's a purchase price. The amount has been scratched through of three hundred forty thousand and three hundred and thirty-nine thousand with some initials. Do you know whose initials those are?

A. Those are Jim's.

Q. Okay. And that reflects the change in the final purchase price?

A. Yes.

Q. Paragraph 2.3 requires application for financing. And that was to be done (inaudible) representation by September first. Did you make a loan application prior to September first?

A. Yes.

Q. And who did you apply with?

A. Washington Mutual.

Q. And what did they tell you?

A. Initially told us that everything looked good. Our

credit was excellent. We'd done work with them before. This property was larger than what they normally loan on but they, the loan officer said with our credit that the underwriter should be able to make an exception on this property.

Q. Did there come a time when Washington Mutual objected to making the loan?

A. Yes.

Q. Tell us what happened.

A. They notified us that the, well, actually what happened that the appraiser was supposed to go appraise the property and I guess he or she talked to Jim and once the appraiser found out that it was a working farm.

MR. ALLRED: Object (inaudible). It appears we're getting some hearsay. (inaudible) some appraiser.

THE COURT: Well, if it came from Jim, we're going to let him talk about it.

MR. ALLRED: I understood he was talking about what but some appraiser was telling him.

THE COURT: Okay.

BY MR. LUNDGREN:

Q. Let me just clarify that, Your Honor. So there will be no misunderstanding. Ultimately what did Washington Mutual tell you?

A. That they wouldn't loan on a working farm.

Q. Did that cause you great concern?

Q. Did you do anything else to obtain financing on the property?

A Yes

Q. Were you ultimately able to obtain ultimate financing

A Yes.

Q. And who offered to provide that financing for you? What financial institution?

A. Through American National.

Q. Did you relay any of this information to Mr. Farnsworth?

A. Well, in between that, we had started talking to Wells Fargo, Zions and Western (inaudible) Credit and we, I mean they wanted us to put up a big proposal on how we're going to make money farming. I talked to Jim about that I actually asked him to help me draw up a, you know, a business plan to make money on the farm. But I also told him at about the same time that, you know, we would get this property one way or another and then I started mentioning to him different financing options. And the lease option was one of them.

Q. Did Mr. Farnsworth indicate to you that they had any interest in that lease option?

A. Initially not much. I mean, but he called me back a day or two later and said he really liked the idea of the lease option.

Q. Did he explain to you why he liked that?

A. He liked the idea because if we defaulted on it he wouldn't have to foreclose. It would, it, everything would still be in his name. And I really liked it because it gave me an opportunity to do a ten thirty-one exchange on another piece of property that I currently own.

Q. Did you then commence discussions with him about the terms of the lease option?

A. Extensively.

Q. Let me show you a document which has been marked Exhibit Two. Do you recognize this document?

A. Sure.

Q. Can you tell The Court what this document is?

A. This is the copy of the lease option that we prepared to send to Jim to look over and this is what we thought was going to happen. We already agreed in principle to the terms of this purchase agreement.

Q. There are signatures on the second page of this document. Can you tell us whose signatures those are?

A. Those are mine and my wife's.

Q. And there's a date, October fifth. Is this the date this was prepared?

A. Yes.

Q. At any time prior to November first did Mr. Farnsworth ever tell you that he refused to enter into a lease option

A. No.

Q. At any time prior to November first did you ever tell Mr. Farnsworth that you could not arrange financing to purchase the property?

A. No.

Q. If Mr. Farnsworth had told you at any time that he would not do the lease option, did you believe you had other financing options available to you?

A. Sure.

Q. And that included a commitment from American National Bank?

A. Yes.

Q. Concerning Plaintiffs Exhibit Number Two, you stated that set forth the terms that you had discussed with Mr. Farnsworth. Did Mr. Farnsworth ever make or suggest any amendments to these terms?

A. Yes.

Q. What changes did he suggest?

A. Initially when he got the contract he called me and he, we were going to make some changes to the timing on the payments for the lease, basically to protect me in case something was lost in the mail that the option would not expire immediately. There would be a longer term, you know, just so the option wouldn't disappear.

Q. And information? When you sent that, what'd you do? Mail it to Jim Farnsworth?

A Yes

Q. He said, he initially showed no interest in it but later did?

A. All the terms of this agreement we had hashed out over on the telephone. We agreed to everything in this contract before I submitted it to him.

Q. Your testimony was that he showed no interest but later said that he, that it did some interest to him because I remember you were interested because of a ten twenty-three (inaudible). Is it? Was I (inaudible)?

A. Okay. Before this was ever prepared.

Q. That was before October (inaudible)

A. When I was talking to Wells Fargo, Zions and Western (inaudible) Credit, I was talking back and forth to Jim on the telephone as well. And I, it was kind of frustrating dealing with those banks because they wanted, they were loaning the money from a farming persepctive. I don't have any experience farming so you know, I talked to Jim, I said "Jim, worse case senario, we've got a lot of options to purchase the property." I started throwing up some of the worst case senarios, that's owner financing.

Q. I understand.

A. Yes, I

Q. I'm just trying to figure out, you said you prepared Exhibit Two and mailed it to him sometime on or after October fifth and then you said that there were, and then you started having, it's my understanding that you had discussions after that in timing terms, and what we're really looking at is you discussed changing the line sixteen where you put a November first, two thousand four date for an acceptance. You talked about changing that. My understanding was you then, you mailed it to Mr. Farnsworth and had some discussion about changing some of the terms.

A. Some of the information, we talked on the telephone about some of the terms when he got it.

Q. Okay.

A. They were, I mean, I hadn't modified this generic contract so the terms were as what we talked about. And I talked about the one item of the payment being late.

Q. Well, you talked as I understood it, changing the date for acceptance, who's paying the water, who pays the taxes, those things all occured after you mailed this and sent it to him? Is my understanding correct there?

Q. He just wanted those items specifically included.

Q. Did you ever reach an agreement on any of those terms?

A Absolutely

Q. Then you said that, I guess you decided to look in the

see your signature on it. Was it ever signed by any of the Defendants?

A. No

Q. You never received a signed copy of that?

A. No.

Q. You said that the twenty-fourth came and past and you (inaudible) set a date to close the lease?

A. I was unable to contact him. He was out of town.

Q. At any time prior to October twenty-fourth, did you ever take a check to Basin Land and Title for the purchase?

A. No.

Q. Did you ever take the money to Basin Land and Title?

A. No.

Q. Did you ever send any of the Defendants a check for the closing price?

A. No. They only had the earnest money.

Q. As of, as of October fifth, you had replaced your real estate purchase contract with Exhibit Two, the lease. Wasn't it?

A. Yes. That's what I thought was happening.

Q. And actually you had changed, the original closing date, there's an acceptance date of sixteen which is November one two thousand four.

A. That's correct.

Q. So when you called, you said you called him on the

Q And you had not obtained any loan for the property. Had you?

A. That's correct.

Q. As of October twenty-fourth, you didn't have a loan for it. Did you?

A. I had financing available.

Q. You say you have a commitment that's dated in November. That's all you've got.

A. That's correct. And I could have closed this.

Q. And you've never tendered one dime to anybody. Had you?

A. Other than the earnest money, I've never tendered an money.

REDIRECT EXAMINATION

BY MR. LUNDGREN:

Q. I draw your attention to Exhibit Number One. That is the document you signed first for the property. Is that correct?

A. Yes.

Q. And then during the period of time that you were obtaining financing, is it your testimony that you had understood that Mr. Farnsworth preferred the lease option?

A. Would you restate that question?

Q. Did Mr. Farnsworth state a preference to you as to whether or not to go on a cash purchase or whether he would prefer going on a lease option?

A. Not necessarily. But he did call me back and tell me that he liked the idea of the lease option while I was pursuing the cash financing.

Q. Was it your intent during your discussions with Mr. Farnsworth, or excuse me, was it your understanding in your discussions with Mr. Farnsworth that by entering into the lease option that any of your rights under the purchase agreement would be cancelled?

A. No.

Q. Did you have an understanding that if the lease option did not work out as to whether or not the purchase option was still available?

A. Yes. I assumed that it was and I specifically told him that I wanted to execute the lease option within the time frame of the original purchase contract.

Q. If at any time after October twentieth, Mr. Farnsworth would have stated to you you've got to come up with the three hundred and thirty-nine thousand dollars, would you have been able to do that?

A. Yes.

Q. And from whom?

A. A good friend, Mr. Paul Ensalmi, that just walked into

ADDENDUM C

JAN 11 2005

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR
DUCHESNE COUNTY, STATE OF UTAH

TY ELDRIDGE and MARINA ELDRIDGE, Plaintiffs, vs. JAMES L. FARNSWORTH, DAVID FARNSWORTH, and GREGORY FARNSWORTH, Defendants.	RULING and ORDER CASE NO. 040800079 JUDGE JOHN R. ANDERSON

This matter is before the Court on Defendants' motion for summary judgment. That motion was filed with the Court on August 26, 2005, and was accompanied by a supporting memorandum. The Plaintiffs filed a memo in opposition to that motion on November 01, 2005. The Plaintiffs' opposition memo also included Plaintiffs' cross-motion for summary judgment. The Court notes that it has not yet received a request for a decision on Plaintiffs' cross-motion for summary judgment. The Defendants filed with the Court a reply memo on their motion for summary judgment on November 14, 2005, which included a request for oral argument on the motion. The Court entertained oral argument on December 19, 2005, and having received a notice to submit this motion for decision on November 18, 2005, the Court now issues its ruling and enters its order on the Defendants' summary judgment motion.

This case started when the parties entered into a real estate purchase contract ("the REPC") on August 24, 2004, which contract was to close by October 24, 2004. As part of an order entered on December 20, 2004, the Court has previously made

findings that the Plaintiffs encountered difficulty obtaining financing for the transaction and the parties began discussing alternative means to finance the transaction. See Order, pg. 2 (filed December 21, 2004). It appears that the Plaintiffs suggested a lease with an option to purchase ("the Lease Option") in lieu of obtaining conventional financing to purchase the property outright.[1] The parties began negotiating the terms of the Lease Option sometime in the middle of September and continued to negotiate beyond the October 24, 2004 closing date specified in the REPC. Ultimately, no lease with an option to purchase was ever signed by the parties and the REPC never closed within the timeframe established by the REPC. In November 2004, the Defendants sold the property which was the subject of the REPC to a third party.

The Plaintiffs brought suit against the Defendants for breach of contract, seeking: 1) specific performance of the REPC; 2) an injunction barring the sale of the property; and 3) damages and costs. The Plaintiffs have subsequently amended their complaint to include the following causes of action: 1) waiver; 2) fraud; and 3) promissory estoppel. Based upon those theories, the Plaintiffs are still seeking specific performance of the REPC or the Lease Option.[2] There are three issues the Court must address in order to rule upon the Defendants' summary judgment motion: 1) the statute of frauds as it relates to Plaintiffs' promissory estoppel claim; 2) the Plaintiffs' fraud claim; and 3) waiver issues. Each will be addressed in turn.

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[1] Conventional financing was specified in the REPC. See "Defendant's Memorandum in Support of Motion for Summary Judgment," Exhibit C (filed August 26, 2005).

[2] In their Second Amended Complaint, a copy of which is attached to Plaintiffs' "Motion to Amend the Pleadings to Conform with the Evidence," filed on December 13, 2005, the Plaintiffs ask the Court to "order the Defendants to enter into, complete and honor the lease option agreement" OR "alternately allow the Plaintiffs to complete the purchase agreement with conventional financing."

I. THE STATUTE OF FRAUDS and PROMISSORY ESTOPPEL

Statutes of frauds are intended to bar enforcement of certain agreements that the law requires to be memorialized in writing. The relevant statute of frauds reads:

> Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

Utah Code Ann. § 25-5-3 (2005). Both of the contracts at issue in this action, 1) the REPC which was entered into by the parties in august 2004 and 2) the Lease Option which was never executed between the parties, are required by the express language of the statute to be memorialized in writing to be enforceable.

Because the REPC was in writing, it satisfied the statute of frauds and was therefore an enforceable agreement between the parties. However, neither of the parties to the REPC performed under the terms of that agreement.[3] It appears that once the Plaintiffs encountered difficulty obtaining the conventional financing specified in the REPC, and began negotiating the Lease Option instead, the REPC was abandoned by both parties. Either way, it is clear from the record that the date for settlement under the REPC passed without full performance by either party. While the parties are free to sue each other for defaulting under the REPC, seeking specific performance (an equitable remedy) requires "clean hands," see LHIW, Inc. v. De Lorean, 753 P.2d 961, 963 (Utah 1988), which, due to non-performance, neither of the parties possesses under the REPC.

Furthermore, because the Lease Option was never reduced to writing and signed by the Defendants, it cannot satisfy the statute of frauds and therefore is unenforceable. The Plain-

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[3] The Defendants apparently did not provide seller disclosures or title commitments. See "Plaintiffs' Cross Motion," pg. 3 (filed November 01, 2005). Similarly, the Plaintiffs never tendered the purchase price. See "Defendants' Memorandum in Support of Motion for Summary Judgment," pg. 4 (filed August 26, 2005).

tiffs argue that the Lease Option should be enforced regardless of the statute of frauds based upon a theory of promissory estoppel. The Utah Supreme Court has defined promissory estoppel, stating:

> [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Tolboe Constr. Co. v. Staker Paving & Constr. Co., 682 P.2d 843, 845 (Utah 1984) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981)). Under this definition, the Plaintiffs would be entitled to the relief they seek if they could establish a promise, reasonable reliance, and injustice.

However, there are limits to the doctrine of promissory estoppel when real property is involved. These limits have been addressed by the Utah courts. In support of their motion for summary judgment, Defendants cite F.C. Stangle v. Earnst Home Centers, 948 P.2d 356 (Utah App. 1997). In Stangle, the Utah Court of Appeals addressed the issue of "whether promissory estoppel precludes [a defendant] from asserting the statute of frauds as a defense." Stangle, 948 P.2d at 360. This issue is a matter of law, properly decided by this Court on summary judgment. Id. The Stangle court stated,

> in situations involving the purchase or lease of real property, [] Utah cases have narrowly circumscribed the application of promissory estoppel to the statute of frauds. **A defendant is estopped from asserting the statute of frauds as a defense only when he or she has expressly and unambiguously waived the right to do so.**

Stangle, 948 P.2d at 360-61 (emphasis added). Moreover, a mere refusal to perform an oral agreement within the statute of frauds, however, is not such fraud as will justify a court in disregarding the statute of frauds even though it results in hardship to the plaintiff. See id. at 362.

In this case, the Plaintiffs are asking this Court to require the Defendants to perform under an oral agreement (the Lease Option). As applied to this case, Stangle instructs that this Court cannot disregard the statute of frauds, even though it appears that the Plaintiffs may suffer some hardship as a result of such judgment. If this Court were to to accept the Plaintiffs' estoppel argument,

> parties to a contract negotiation could not rely on the protections afforded by the statute of frauds, thereby eviscerating it. Moreover, contract negotiators would never know at what point mere negotiations became a binding contract. Parties to contract negotiations should be entitled to rely on the statute of frauds absent a clear manifestation of intent to claim no reliance. A party concerned about the assertion of the statute of frauds could easily protect itself by demanding written commitments before acting in reliance on the negotiations.

Id. at 365.

The Court finds that Stangle controls in this case. At no time did the Defendants' conduct "clearly manifest an intention that [they] would not assert the statute of frauds." Id. Regardless of the fact that no written lease was ever memorialized, and the fact that both parties had apparently abandoned the REPC sometime in September 2004, the Plaintiffs gambled that the Lease Option negotiations would be successfully concluded. Even if this Court found that the Defendants assured the Plaintiffs that they would enter into the Lease Option with the Plaintiffs, "a mere promise to execute a written contract and a subsequent refusal to do so is insufficient to create an estoppel, although reliance is placed on such a promise and damage is sustained as a consequence of the refusal." Id. To be clear, promissory estoppel bars a defendant from asserting the statute of frauds as a defense only where the party has clearly and unequivocally represented that it would not use it as a defense. See id. at 365-66. Accordingly, because the Defendants did not represent that they would not assert the statute of frauds as a defense, the Defendants are not estopped from doing so. This holds true even though the Defendants refused to enter into the Lease Option, which they had negotiated in lieu of the REPC.

Because the Defendants are not barred from asserting the statute of frauds as a defense, and because the Lease Option was within the statute of frauds, the same is void because it was not in writing. See Utah Code Ann. § 25-5-3 (2005).

II. FRAUD

To establish fraud under Utah law, the plaintiff must prove by clear and convincing evidence each of the following elements:

> (1) that a representation was made (2) concerning a presently existing material fact (3) which was false, (4)which the representor either (a) knew to be false or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation, (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon the representation, and (8) was thereby induced to act upon it, (9) to his injury and damage.

See Franco v. the Church of Jesus Christ of Latter-Day Saints, 2001 UT 25, ¶33. In addition, the Utah Rules of Civil Procedure require that all averments of fraud be stated with particularity. URCP Rule 9(a)(3); see also Wright and Miller, Federal Practice and Procedure § 1297, at 590 (1990).

First, the Plaintiffs have made general allegations of fraud. Plaintiffs have claimed that the "Defendants misled the Plaintiffs into believing that the Defendants preferred a lease option," knowing that if they could delay closing on the property under the REPC, Plaintiffs would default and the Defendants could then accept a more lucrative offer from another party. See *"Second Amended Complaint," pg. 4 (permission to amend* granted at oral argument on December 19, 2005). These allegations of fraud are insufficient under Rule 9 of the Utah Rules of Civil Procedure, as they do not possess the requisite particularity required by statute.

The Plaintiffs also allege specific instances of fraud, but only regarding events which transpired after the October 24, 2004 REPC closing deadline. These specific instances of alleged fraud involved a "fabricated" realtor commission, which the

Plaintiffs argue was fabricated by Defendants to avoid having the Plaintiffs demand closing on the REPC. See "Plaintiffs' Cross-Motion for Summary Judgment, at pg. 12 (filed November 01, 2005). Under Utah law, to be fraudulent, a representation must concern a "presently existing material fact." See Franco, 2001 UT 25, ¶33. After October 24, 2004, any fraudulent representations allegedly made by the Defendants would be immaterial to the REPC, since its closing date had already passed and the parties had not agreed, in writing, to an extension of any of the deadlines specified in the REPC.

Second, "fraud, generally, cannot be predicated upon the failure to perform a promise or contract which is unenforceable under the statute of frauds, for the promissor has not, in a legal sense, made a contract; and therefore, he has the right, both in law and equity, to refuse to perform." Stangle, 948 P.2d at 362. This means that any claim of fraud predicated upon the Lease Option, or representations made regarding the Lease Option, are insufficient as a matter of law, because the Lease Option is void under the statute of frauds.

Additionally, the Court notes that the Plaintiffs have argued that, as part of the Lease Option negotiations, Defendant James Farnsworth "made suggestions to modify the Lease Option Agreement." See "Plaintiffs' Cross-Motion for Summary Judgment," at pg. 8 (filed November 01, 2005). The Plaintiffs indicate that these modifications were suggested on October 9, 2004. Id. Plaintiffs argue that

> the only logical explanation is that Jim was acting in good faith to bring about the terms of the Lease Option to a fair and final agreement. Unless Jim had a bona fide intention to pursue the Lease Option, there would have been no reason to suggest a change in a term which would benefit the Eldridges.

Id. The Plaintiffs cannot have it both ways, arguing in one breath that negotiating the Lease Option was a ploy to avoid a demand for performance of the REPC **AND** that the Defendants were sincere in their desire to find Lease Option terms which would be amenable to both parties. Such arguments appear to this Court to be diametrically opposed; either the Defendants were

negotiating the Lease Option fraudulently or they were negotiating with good faith. Based upon the foregoing, the Court finds that the Plaintiffs fraud claims are insufficient as a matter of law.

III. WAIVER

"Waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it." Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 942 (Utah 1993). In this case, both parties had rights against the other party by virtue of the REPC. Those rights are independent of the proposed Lease Option which never materialized and never provided any rights to the Plaintiffs or the Defendants.

The Plaintiffs acknowledge that "the Defendants had a right to rely on the REPC." "Plaintiff's Cross-Motion for Summary Judgment," pg. 15. The Plaintiffs also acknowledge that "when the parties agreed to proceed with the Lease Option, they waived their right to proceed with the REPC...they relinquished their right to the REPC..." Id. The Court is of the opinion that both parties abandoned the REPC sometime in September 2004. In doing so, both parties would have intentionally relinquished known rights under the REPC. Regardless, the fact that the parties had waived rights under the REPC does not in any way make the Lease Option a binding agreement between these parties. The fact of the matter is that even if the Defendants intentionally relinquished all of their rights under the REPC, the Lease Option was never memorialized in writing and signed by the Defendants. Therefore, the Plaintiffs' waiver argument is also insufficient as a matter of law.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Defendants' Motion for Summary Judgment is GRANTED. Additionally, even though the Court has not received a request for a decision on the Plaintiffs' Motion for Summary Judgment, that motion is hereby DE-

NIED. This is a direct result of granting the Defendants' motion for summary judgment and is done now in an effort to resolve the matter and to ensure consistent rulings in this matter.

Dated this 11th day of January, 2006.

BY THE COURT:

JOHN R. ANDERSON, DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040800079 by the method and on the date specified.

METHOD	NAME
Mail	ALVIN R LUNDGREN ATTORNEY PLA 5015 W OLD HWY STE 200 MT GREEN, UT 84050
By Hand	CLARK B ALLRED

Dated this 11 day of January, 2006.

Deputy Court Clerk

ADDENDUM D

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR

DUCHESNE COUNTY, STATE OF UTAH

TY ELDRIDGE and MARINA ELDRIDGE, Plaintiffs, vs. JAMES L. FARNSWORTH; DAVID FARNSWORTH; GREGORY FARNSWORTH, Defendants.	**RULING and ORDER** CASE NO. 040800079 JUDGE JOHN R. ANDERSON

This matter is before the Court on the following motions: 1) Plaintiffs' "Motion to Reconsider," filed with the Court on January 30, 2006; 2) Plaintiffs' "Motion to Extend the Time to Appeal," filed with the Court on February 14, 2006; 3) Plaintiffs' "Objections to the Order Submitted by Defendants Without Notice or Motion Dated January 12, 2006," filed with the Court on January 18, 2006; and 4) Defendants' "Motion to Award Fees and Costs," filed with the Court on January 18, 2006. The Court has reviewed these motions and the memoranda in support of, and in opposition to, each respective motion. The Court has also reviewed the Plaintiffs' objections to the Defendants' proposed order. Having received notice to submit these motions for decision, and being informed in the matter, the Court will now address each of the motions and the objections in turn.

PLAINTIFFS' MOTION TO RECONSIDER

While the Court does have discretion in determining whether to reconsider an order so long as no final judgment has entered, see Brookside Mobile Home Park v. Peebles, 2002 UT 48, ¶18 (citing U.P.C., Inc. v. R.O.C. Gen., Inc., 1999 UT App 303, ¶55;

Utah R. Civ. P. 54(b)), the Utah Supreme Court has pointed out that such motions are not recognized by the rules of procedure in civil cases and has discouraged the filing of such motions.

> The Utah Rules of Civil Procedure do not recognize motions to reconsider. Although we have discouraged these motions, they have proliferated in civil actions to the extent that they have become the cheatgrass of the litigation landscape. We acknowledge that the extraordinary circumstance may arise when it is appropriate to request a trial court to reconsider a ruling. These occasions are rare, however, and we encourage attorneys to reverse the trend to make motions to reconsider routine.

Shipman v. Evans, 2004 UT 44, ¶18 n.5 (citations omitted). The Utah Supreme Court notes that there are, on rare occasion, extraordinary circumstances warranting a request for a trial court to reconsider a ruling. However, the Court cannot see, and the Plaintiffs have failed to present, any reason as to why these particular circumstances are extraordinary such that their motion to reconsider should be granted. Therefore, this Court will not entertain the Plaintiffs' motion to reconsider as it relates to any issue already explicitly addressed by the Court in its January 11, 2006 ruling.

In that ruling, the Court addressed each cause of action identified in Plaintiffs' "Second Amended Complaint."[1] The Court granted Plaintiffs' motion to file the amended complaint at oral argument on December 19, 2005, and signed an order on that motion January 11, 2006. "Once a party has amended a pleading, the amended pleading supersedes the original pleading, and the original pleading performs no function in the case." Campbell v. Debry, 2001 UT App 397, ¶17 n.4 (citing 6 Federal Practice &

[1] The Plaintiffs second amended complaint also sought "alternate recovery," arguing that it would be "unconscionable for the Defendants to profit from their intentional deceit." Id. at pg. 6. The Court did not explicitly address this in its January 11, 2006 ruling. However, a review of the record shows nothing material upon which to make a finding of intentional deceit on the part of the Defendants. The Court has already ruled that, as a matter of law, the Plaintiffs' fraud claims fail. By doing so, the Court intended to include in that ruling the Plaintiffs' claims for "intentional deceit." Further, a review of the record indicates that the Plaintiffs have failed to argue anything in support of their claim for alternate recovery.

Procedure, Wright, Miller & Kane § 1476 (1990); see also Moore's Federal Practice, Civil § 15.17(3) ("An amended pleading that is complete in itself and does not reference or adopt any portion of the prior pleading supersedes the prior pleading.")). Therefore, any cause of action contained in the original complaint or the first amended complaint, but not contained in the Second Amended Complaint, "performs no function in the case." Campbell, 2001 UT App 397, ¶17 n.4.

Having addressed each of the causes of action in the second amended complaint explicitly, the Court will not revisit them in any detail. In addition to the issues explicitly ruled upon by the Court, there are also certain issues raised by the Plaintiffs in their motion to reconsider which, as a result of granting Defendants' motion for summary judgment, have been implicitly ruled upon by the Court. In order to bring clarity to those issues, the Court will briefly explicate for the benefit of the complaining party.

The Plaintiffs' argue that the Court's January 11, 2006 ruling "summarily dismissed the Plaintiffs' Motion for Summary Judgment without explanation." See Plaintiffs' "Memorandum in Support of Their Motion to Reconsider," pg. 2 (filed January 30, 2006). The Plaintiffs argue that they are

> entitled to an explanation of the Court's reasons for denying their motion, including each issue addressed by the Plaintiffs, not raised in the Defendants' Motion for Summary Judgment, including Plaintiffs' motion for specific performance; [sic] and Plaintiffs' motion to deny Defendants' request to find the lis pendens a wrongful lien.

Id. The Court will discuss damages, specific performance, and the lis pendens.

Before discussing damages and specific performance individually, the Court wishes to raise the following general point as it relates to both damages and specific performance. The Utah Supreme Court has ruled that

> [n]either party to an agreement can be said to be in default (and thus susceptible to a judgment for damages or a decree for specific performance) until the other party has

> tendered his own performance. In other words, a party must make a tender of his own agreed performance in order to put the other party in default.

Kelley v. Leudacia Financial Corp., 846 P.2d 1238, 1243 (Utah 1992) (internal citations and quotations omitted). Because there is no indication that either of the parties tendered their own agreed performance under the REPC, neither the Plaintiffs or the Defendants are in a position to compel specific performance or recover damages. The Court is persuaded by the Defendants' argument on this point. See Defendants' "Memorandum in Opposition to Plaintiffs' Motion to Reconsider," pg. 4 thru 11 (filed February 10, 2006).

A. DAMAGES

In the Plaintiffs' second amended complaint, they seek "reasonable compensation for the damages, actual, consequential, and incidental, sustained by Plaintiffs" and "punitive damages." Plaintiffs' "Second Amended Complaint," pg. 7. The Court, in its January 11, 2006 ruling, already ruled upon the Plaintiffs' estoppel, fraud and waiver claims. Therefore, because those are the only causes of action pled by the second amended complaint, there remains nothing upon which the Court could base an award of damages.

In their original complaint, the Plaintiffs did plead breach of contract. However, as already noted, the later amended pleadings superseded the original complaint. Because the latest amended pleading did not include any action for breach of contract, nor did it incorporate any reference to the earlier complaints, that cause of action was deemed by this Court to have been abandoned. Further, it would be incongruous to grant Defendants' motion for summary judgment (which addressed all claims upon which an award of damages could be based) and then award damages to the Plaintiffs. Therefore, by granting the Defendants' motion for summary judgment, the Court had implicitly denied the Plaintiffs an award of damages, and, for the sake of perfect clarity, explicitly denies Plaintiffs request for damages at this time.

B. SPECIFIC PERFORMANCE

As the Court noted in its January 11, 2006 ruling, the REPC was an enforceable agreement and satisfied the statute of frauds. However, sometime in the middle of September 2004, the parties abandoned that agreement. Neither party performed their obligations under the REPC. Therefore, due to non-performance, the parties waived their rights under that contract.

The Plaintiffs argue that they are entitled to specific performance on this contract, invoking either equitable specific performance or specific performance as outlined in the REPC. The Court has already addressed both of these arguments in its January 11, 2006 ruling, but will briefly re-visit the issue. First, the REPC, which created a contractual right to specific performance, was abandoned by the parties. Therefore, it cannot serve as a basis upon which this Court can grant specific performance. Second, because neither of the parties performed under the REPC, neither are in a position to seek equitable remedies. Therefore, equitable specific performance is not an option. Finally, the Lease Option was never memorialized in writing as required by law. Therefore, it cannot be specifically enforced. As this Court views the situation, there is no avenue by which to grant specific performance in this case.

It is appropriate at this point to clarify a point made by the Court in its January 11, 2006 ruling. In discussing specific performance, the Court stated, "...the parties are free to sue each other for defaulting under the REPC...." Ruling, pg. 3. In making this statement, the Court was contemplating a separate lawsuit for breach of contract. Indeed, as already stated, the original complaint in this action included a claim for breach of contract. That claim, again as already stated, was not included in later amended pleadings, therefore it was deemed by the Court to have been abandoned. The Plaintiffs have indicated that "[t]his Court recognized the issue in its judgment on the motions for summary judgment in stating this issue was preserved for trial." See Plaintiffs' Objections to Defendants' Reply Memorandum, filed February 14, 2006 pg.1. The Plaintiffs misunderstand the Court's ruling. To be clear, the breach action was not included in the second amended complaint. Therefore, when the Court said the parties were free to sue each

other for breach, that contemplated a separate action for breach of contract. The Court did not, at any time, state that the issue was preserved for trial.

C. THE LIS PENDENS

The lis pendens is the primary subject of the Plaintiffs' objections to the Defendants' proposed order which followed the Courts' January 11, 2006 ruling. The Plaintiffs have pointed out that the Court did not address the lis pendens in its January 11, 2006 ruling. The Court concedes this point and recognizes the need to rule upon this issue in order to conclude the matter.

The Defendants have argued that the lis pendens constitutes a wrongful lien. The Defendants argue that the lis pendens has been wrongful from the date on which the Court made findings and dissolved the TRO in this matter. The Court reminds the Defendants that at the hearing on November 29, 2004, the Court was specifically addressing the case in light of the TRO which had been entered. The Court was not addressing the merits of the underlying causes of action at that time.

Therefore, the Court is of the opinion that the lis pendens has not, at any time in this matter, been wrongful. The fact of the matter is that litigation has been pending during the entire time that the lis pendens has been in place. The lis pendens "charges the public with notice of outstanding claims and causes one who deals with property involved in pending litigation to do so at his peril." Hidden Meadows Dev. Co. v. Mills, 590 P.2d 1244 (Utah 1979). The Court believes that the lis pendens has been lawfully in place, notifying the public of pending litigation. Therefore, the Court will not order the removal of the lis pendens. Similarly, the Court will not award the Defendants any damages, costs or fees as they relate to the lis pendens.

The Court also reminds the parties that the lis pendens can lawfully remain in place after this Court issues final judgment in the matter, pending any forthcoming appeal. See Hidden Meadows, 590 P.2d at 1248.

PLAINTIFFS' MOTION TO EXTEND THE TIME TO APPEAL

Upon review of this motion, the Court is convinced that this motion is unnecessary at this time, as a final judgment has not yet issued. Even though the Court's January 11, 2006 ruling was caption "Ruling and Order" and contained a paragraph titled "Order," neither of the parties have treated that as a final judgment. The Defendants' submitted a proposed order to the Court, which, as of yet, the Court has not signed. Submitting this proposed order to the Court indicates to the Court that the Defendants did not view the Court's ruling as a final order in the matter. Therefore, the Court finds that no final judgment has entered and therefore the Plaintiffs' time to appeal has not yet begun to expire. As a result, because this issue is not ripe for decision, the Court will dismiss the motion.

DEFENDANTS' MOTION TO AWARD FEES AND COSTS

As Defendants have correctly stated, attorney fees are only awarded if permitted by statute or contract. No statute awards attorney fees in a matter such as this, except for the portion of this matter involving the TRO and the lis pendens. The Court is of the opinion that the Defendants should be awarded the fees incurred in defending against the TRO. As for the lis pendens, fees are only recoverable in the event that the lis pendens was wrongful. The Court has ruled that the lis pendens was not wrongful, therefore there can be no recovery under that statute.

Having addressed the relevant statutes, the Court now turns to the contract between the parties. The REPC specifically addresses attorney fees. While this was, at one time, an enforceable contract between these parties, that contract cannot serve as a basis for the award of fees in this matter. The Court has found that the parties abandoned the REPC and relinquished their rights thereunder. Indeed, it is for this reason, in large part, that the Court granted the Defendants' motion for summary judgment. It would be incongruous to say that the parties abandoned the REPC, but the Defendants can recover their fees under that same contract.

Therefore, no attorney fees will be awarded to the Defendants other than those fees incurred as a result of the TRO.

Because the Court finds that the REPC had been abandoned by both parties sometime in September 2004, the provision of the REPC awarding attorney fees to the prevailing party in the event of litigation to enforce the REPC is no longer enforceable.

Finally, the Defendants, as the prevailing party in this matter, will be awarded their costs of suit.

ORDER

Therefore, IT IS HEREBY ORDERED: that Plaintiffs' motion to reconsider is DENIED (noting that the Court finds no basis for an award of damages or specific performance for the Plaintiffs); that Plaintiffs' motion to extend time for appeal is DISMISSED as not ripe for decision; that the Defendants' motion for fees and costs is GRANTED IN PART, but only as to 1) the recovery of attorney fees for the portion of this case involving the TRO and 2) an award of their costs of suit as the prevailing party; and that the lis pendens is not wrongful and should not be removed during the pendency of this litigation, including during any pending appeal.

Dated this 29 day of March, 2006.

BY THE COURT:

JOHN R. ANDERSON, DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040800079 by the method and on the date specified.

METHOD	NAME
Mail	CLARK B ALLRED ATTORNEY DEF 363 E MAIN ST STE 201 VERNAL, UT 84078
Mail	ALVIN R LUNDGREN ATTORNEY PLA 5015 W OLD HWY STE 200 MT GREEN UT 84050

Dated this 29 day of March, 2006.

D. Shufard
Deputy Court Clerk

ADDENDUM E

CLARK B ALLRED - 0055
CLARK A. McCLELLAN - 6113
ALLRED & McCLELLAN, P.C.
Attorneys for Defendants
363 E Main Street, Suite 201
Vernal, Utah 84078
Telephone: (435) 789-7800

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

TY ELDRIDGE and MARTINA ELDRIDGE, Plaintiffs, vs. JAMES L. FARNSWORTH; DAVID FARNSWORTH; GREGORY FARNSWORTH, Defendants.	ORDER Case No. 04080079 Judge John R. Anderson

The above-captioned matter came before the Court, pursuant to Defendants' Motion for Summary Judgment, which was filed on August 26, 2005. The Plaintiffs also filed a Cross Motion for Summary Judgment. The parties submitted memoranda on the motions and the Court heard oral argument on December 19, 2005. The Court then entered its Ruling and Order on January 11, 2006. The Court's Ruling and Order grants the Defendants' Motion for Summary Judgment and denies the Plaintiffs' Cross Motion for Summary Judgement. The Plaintiff then filed a motion to reconsider, and a motion to extend time to appeal, while Defendants filed a motion for fees and costs The Court entered its Ruling and Order on those motions on March 29, 2006

Based on those Rulings and Orders and the findings and reasons set forth therein, the Court hereby Orders that:

1. Plaintiffs' Second Amended Complaint (which the Court allowed to be filed at the December 19, 2005 hearing) is dismissed with prejudice.

2. Plaintiffs' motion seeking additional time to appeal is dismissed as it was filed prematurely.

3. Plaintiffs' motion to reconsider is denied.

4. Defendants' Counterclaim alleging an unlawful lis pendens is dismissed with prejudice.

5. Defendants are awarded the fees incurred on that portion of the case involving the TRO. Defendants are also awarded their costs. An affidavit setting forth the fees incurred shall be filed with the Court and the Plaintiffs shall have ten days from the mailing of the affidavit to file an objection as to the reasonableness of the fees. If there is an objection the Court will hold a hearing on the reasonableness of the fees.

DATED this 24 day of April, 2006.

BY THE COURT:

John R. Anderson
District Judge

ADDENDUM F

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR
DUCHESNE COUNTY, STATE OF UTAH

TY ELDRIDGE and MARINA ELDRIDGE, Plaintiffs, vs. JAMES L. FARNSWORTH; DAVID FARNSWORTH; GREGORY FARNSWORTH, Defendants.	**RULING** CASE NO. 040800079 JUDGE JOHN R. ANDERSON

This matter is before the Court on Plaintiffs' "Motion to Conform the Complaint to the Evidence," filed with the Court on March 14, 2006, and accompanied by supporting memorandum and a proposed "Third Amended Complaint." The Defendants filed an opposition memorandum on March 24, 2006. The Plaintiffs filed a response to the Defendants' opposition on April 05, 2006. On that same day, the Court received a notice to submit the motion for decision. Having reviewed the motion and related memoranda, the Court now rules upon the motion.

The motion seeks for a court order amending (for a third time) the Plaintiffs' complaint to include a multitude of issues as identified by the motion, including: 1) specific performance; 2) damages; 3) attorney fees / costs; 4) breach of contract; 5) fraud; 6) waiver; 7) promissory estoppel; 8) punitive damages; 9) covenant of good faith and fair dealing; and 10) intentional / negligent misrepresentation. Before addressing the merits of the Plaintiffs' motion, the Court points out that previous rulings have already explicitly addressed each and every issue identified by the Plaintiffs' motion, except for the issues of

the covenant of good faith and fair dealing and intentional / negligent misrepresentation.

The Plaintiffs, in making their motion, rely on Rules 8(f) and 15(b) of the Utah Rules of Civil Procedure. Rule 8(f) states, "All pleadings shall be so construed as to do substantial justice." The Court recognizes that pleadings are to be construed as to do substantial justice. However, in this case, the issue is not construing a pleading (i.e., the second amended complaint, as the operative pleading), but rather the issue is whether to allow amendment to a pleading for a third time, after summary judgment for the opposing party has issued, to include new causes of action not included in previous pleadings. For that reason, the Court finds that Rule 8(f) is inapposite to the motion before the Court.

Unlike Rule 8(f), Rule 15(b) is arguably relevant to the motion before the Court. Rule 15(b) states,

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

The Court finds that case law interpreting Rule 15(b) as it pertains to lawsuits disposed of at the summary judgment phase is scant. The plain reading of the rule suggests to this Court, as has been held in other jurisdictions, that Rule 15(b) applies only where the case has proceeded to actual trial. See Crawford v. Gould, 56 F.3d 1162 (9th Cir. 1995); Blue Cross Blue Shield of Ala. v. Weitz, 913 F.2d 1544 (11th Cir. 1990). The rule it-

self employs the words "tried" and "the trial." The language of the rule and the persuasive authority from other jurisdictions lends credence to the proposition that Rule 15(b) is only implicated when the case proceeds to trial. This motion would be easily resolved in favor of the Defendants if the Court were to find Rule 15(b) not applicable to cases decided on summary judgment. That said, the parties have identified Hallstrom v. Buhler, 378 P.2d 355 (Utah 1963), which applies Rule 15(b) to a case decided on summary judgment, but that case does not explicitly address Rule 15(b)'s applicability to cases decided on summary judgment. For purposes of this ruling, and against reservations to the contrary, the Court will assume that Rule 15(b) does apply in cases decided on summary judgment, thus giving the Plaintiffs the benefit of the doubt. Even making such an assumption, the Court is not convinced that the rule requires the Court to allow the Plaintiffs to amend their complaint for a third time.

The Court finds that the Defendants have repeatedly objected to Plaintiffs' submission of matters outside of the pleadings for the Court's consideration. See Defendants' "Mem. in Opp. to Plaintiffs' Motion to Reconsider," at 11 (objecting to covenant of good faith and fair dealing); Defendants' "Reply Mem. in Supp. of Motion for Summary Judgment," at 7 (objecting to misrepresentation); Defendants' "Reply Mem. in Supp. of Defendants' Motion to Award Fees and Costs," at 1 (objecting to breach of contract). Having objected to the issues, the Court cannot find that the issues were tried by the express or implied consent of the parties, and therefore the Court is not required to allow amendment of the complaint. Rather, these issues, being specifically objected to, implicate the third sentence of Rule 15(b). See Fibro Trust, Inc. v. Brahman Fin., 974 P.2d 288, 291 (Utah 1999). Under that part of the rule, allowing the Plaintiffs to amend the complaint is subject to the discretion of the trial court. The Court "may" allow the pleading to be amended if: 1) presentation of the merits of the action are thereby subserved and 2) if the objecting party fails to satisfy the Court that the admission of such evidence would be prejudicial to the objecting party.

In this case, the Court finds that neither requirement is met. First, allowing the Plaintiff to amend the complaint will not facilitate presentation on the merits, which have already been fully adjudicated at this late point by the entry of summary judgment in favor of the Defendants. Second, the Defendants have satisfied the Court that prejudice would result if the Court were to allow the Plaintiffs to amend the complaint for a third time and after summary judgment has entered.

The Plaintiffs have offered this Court no explanation as to why these new claims were not included in the First Amended Complaint or in the Second Amended Complaint. Twice the Plaintiffs have amended their complaint (once by right and once by permission of the Court) and, having issued final judgment on the amended complaint, the Plaintiffs now seek to shift to new theories hoping that one such theory will lead the Court to find in their favor. In the opinion of this Court, that is not the purpose of any of the rules relied upon by the Plaintiffs in their motion to conform. The parties have prepared the case, including conducting discovery and arguing motions, based upon the first and second amended complaints. At this late time in the case, it would be clearly prejudicial to the Defendants to allow the Plaintiffs once again to amend their complaint. The Defendants have not prepared their case with these new causes of action in mind, but have diligently objected to the introduction of issues outside of the pleadings. To allow the Plaintiffs to continually refine their strategy, both after summary judgment motions were filed and after judgment was entered on such motions, would work an injustice on the Defendants. Therefore, the Court will deny the Plaintiffs' motion to conform.

Finally, having addressed the only two new causes of action contained in the proposed third amended complaint, the Court wishes to once again briefly address the issue of breach of contract. In the January 11, 2006 ruling, this Court, in discussing specific performance, stated that "While the parties are free to sue each other for defaulting under the REPC, seeking specific performance (an equitable remedy) requires 'clean hands,' which, due to non-performance, neither of the parties possesses under the REPC." January 11, 2006 Ruling, at pg. 3. The Plaintiffs understood this to mean that the issue of breach

of contract was reserved for trial. To clarify the Court's position on this issue, the Court, in the March 29, 2006 ruling, stated that "In making [the statement above], the Court was contemplating a separate lawsuit for breach of contract" because the Court believed that the Plaintiffs, by not including the original breach of contract claim in either of the amended complaints, had abandoned that particular cause of action. Upon further reflection, this Court is of the opinion that a separate lawsuit on breach of contract would be unavailing to either party for, in large part, the very reason that this Court granted the Defendants' motion for summary judgment. The Court has found that the parties abandoned the REPC sometime in September 2004 and that both parties waived the rights that were enforceable by virtue of that agreement. Therefore, the Court was wrong when it stated that the parties were free to sue each other for defaulting under the REPC. That agreement, abandoned by both parties, became unenforceable and neither party can pursue an action for breach of that contract.

Therefore, based upon the foregoing, the Plaintiffs' "Motion to Conform the Complaint to the Evidence" is DENIED.

Dated this 15 day of May, 2006.

BY THE COURT:

JOHN R. ANDERSON, DISTRICT COURT JUDGE

ADDENDUM G

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

TY ELDRIDGE and MARINA ELDRIDGE, Plaintiffs, vs. JAMES L. FARNSWORTH; DAVID FARNSWORTH; GREGORY FARNSWORTH, Defendants.	**RULING AND ORDER** CASE NO. 040800079 JUDGE JOHN R. ANDERSON

This matter is before the Court on Defendants' "Motion to Release Lis Pendens," filed April 25, 2006, and accompanied by supporting memorandum. The Plaintiffs filed an objection to the motion on May 04, 2006. The Defendants' reply memorandum in support was filed May 12, 2006. On July 18, 2006, the Court received a notice to submit the motion for decision. The Court has reviewed the motion, the related memoranda, and the prior rulings in this case, and, having received a request for decision, now rules upon the motion. For the reasons that follow, the Court will grant the motion in part.

The Defendants argue that the lis pendens should be released pursuant to Utah Code Ann. § 78-40-2.5(3), which reads:

> (3) A court shall order a notice released if: (a) the court receives a motion to release under Subsection (2); and (b) the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim that is the subject of the notice.

The Court first notes that while it has addressed the lis pendens in other rulings related to this case, this is the first

time a motion for release has been filed. The Court has ruled that the lis pendens did not constitute a wrongful lien and has cited to Hidden Meadows Dev. Co. v. Mills, 590 P.2d 1244 (Utah 1979) to support the proposition that the lis pendens could stay in place pending the Plaintiffs' appeal. See "Ruling and Order," p. 6 (filed March 29, 2006). In the March 29 ruling, the Court stated that "the Court will not order removal of the lis pendens." Id. The Court further ordered that "the lis pendens is not wrongful and should not be removed during the pendency of this litigation, including during any pending appeal." Id. at 8. In taking that position on the issue of the lis pendens, the Court was considering it in the context of finding the lis pendens to not be wrongful. In other words, the Court's refusal to order the release of the lis pendens was due to the Court's finding that the lis pendens was not wrongful and could therefore lawfully remain in place.

The Defendants' motion to release presents the Court with a new issue to consider. Pursuant to Utah Code Ann. § 78-40-2.5(3), it would appear that the Court has no choice but to release the lis pendens at this time. The statute requires (1) a motion to be filed and (2) a finding by the Court that the "claimant" (as defined by the statute, see Utah Code Ann. § 78-40-2.5(1)(a)) has not established the probable validity of the underlying real property claim. Both of these criteria are met at this time. The Defendants have filed a motion, satisfying the first requirement. Furthermore, the Court has granted the Defendants' motion for summary judgment, indicating that the Plaintiffs' have failed to establish probability of validity of the underlying property claim by a preponderance of the evidence, satisfying the second requirement.

The Plaintiffs argue that, should the Court decide to leave the lis pendens in place, the Court may require a "guarantee" (as defined by the statute, see Utah Code Ann. § 78-40-2.5(1)(b)) as a condition of maintaining the notice. As the Court reads the statute, and as previously stated, the Court does not have a choice as to whether to leave the lis pendens in place once the requirements of § 78-40-2.5(3) are met. The Court does not construe the statute to allow the Court to ignore the mandatory "shall" language of § 78-40-2.5(3) by requiring a

guarantee under § 78-40-2.5(5). Rather, the Court interprets the plain language of the statute to indicate that a guarantee is always an option when a notice of lis pendens is in place, whether or not a motion to release the notice has been filed. See Utah Code Ann. § 78-40-2.5(5)(b). The fact that the Court, in its discretion, may order a guarantee as a condition of maintaining the notice does not give the Court latitude to ignore clear direction from the Utah Legislature. "Shall" is mandatory, and the Court will abide by the requirements of the law as outlined in § 78-40-2.5(3). It is for this reason that the Court will grant the Defendants' motion to release.

In addition to the motion to release, the Defendants have also requested costs and attorney fees as they relate to this motion, pursuant to Utah Code Ann. § 78-40-2.5(7). That statute requires the Court to award such costs and fees "unless the court finds that: (a) the nonprevailing party acted with substantial justification;...." In this case, the Court finds that the Plaintiffs, in filing the lis pendens, acted with substantial justification. At the time the lis pendens was filed, the Plaintiffs honestly believed that they had rights to the underlying property based upon theories of contract and estoppel. The Court does not believe that the Plaintiffs filed suit merely to harass or unjustifiably cloud title to the property. The fact that the Plaintiffs' claims have ultimately been adjudicated by this Court as non-meritorious in no way diminishes the substantial justification the Plaintiffs had when filing the notice of lis pendens. The Court will therefore not award costs or fees, as they relate to this motion, to the Defendants.

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ORDER

Therefore, based upon the foregoing, IT IS HEREBY ORDERED that the Defendant's motion is GRANTED IN PART: 1) the notice of lis pendens is ordered to be released forthwith and 2) the Defendants request for costs and fees on the motion is DENIED.

Dated this 16 day of August, 2006.

BY THE COURT:

JOHN R. ANDERSON, DISTRICT COURT JUDGE

Stamped at [illegible]

By [illegible]

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040800079 by the method and on the date specified.

METHOD	NAME
Mail	CLARK B ALLRED ATTORNEY DEF 363 E MAIN ST STE 201 VERNAL, UT 84078
Mail	ALVIN R LUNDGREN ATTORNEY PLA 5015 W OLD HWY STE 200 MT GREEN UT 84050

Dated this 16 day of August, 2006.

D. Stafford
Deputy Court Clerk

ADDENDUM H

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

TY ELDRIDGE and MARINA ELDRIDGE, Plaintiffs, vs. JAMES L. FARNSWORTH; DAVID FARNSWORTH; GREGORY FARNSWORTH, Defendants.	**RULING and ORDER** CASE NO. 040800079 JUDGE JOHN R. ANDERSON

This matter is before the Court on the following motions: 1) Plaintiffs' Motion to File an Amended Appeal, filed July 28, 2006, and accompanied by supporting memorandum; and (2) Plaintiffs' Motion for Stay of Execution of the Court's Orders and for Approval of the Bond, filed August 23, 2006, and accompanied by supporting memorandum. The Defendants did not respond to the Motion to File an Amended Appeal, and the Plaintiffs submitted a notice to submit on August 23, 2006.[1] The Defendants filed a memorandum in opposition to the motion to stay on September 01, 2006. The Plaintiffs' reply memorandum in support was filed September 20, 2006. The Court received a notice to submit the motion to stay on September 26, 2006. Having reviewed the motions and related memoranda, and having received a notice to submit each motion for decision, the Court now rules upon the motions.

I. MOTION TO FILE AMENDED APPEAL:

[1] The Court was not made aware that this motion was still pending until recently. The Court apologizes for the delay in ruling upon this motion.

The Court's review of the law does not indicate that any such motion exists. Further, even assuming such a motion is appropriate, this is not the correct Court to which to address the motion. Jurisdiction over any appeal in this matter is properly vested in the Utah Supreme Court or the Utah Court of Appeals. This Court lacks the authority to determine what issues will be entertained by the appellate court on appeal. Therefore, the Court will dismiss the motion.

II. MOTION FOR STAY OF EXECUTION OF THE COURT'S ORDERS AND FOR APPROVAL OF THE BOND:

Rule 62 of the Utah Rules of Civil Procedure states, in part,

> When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

Utah R. Civ. P. Rule 62(d). The form of the supersedeas bond can be

> a personal bond having one or more sureties who are residents of Utah having a collective net worth of at least twice the amount of the bond, exclusive of property exempt from execution. Sureties on personal bonds shall make and file an affidavit setting forth in reasonable detail the assets and liabilities of the surety.

Utah R. Civ. P. Rule 62(i)(1). Further,

> [a] supersedeas bond given pursuant to Subdivision (d) shall provide that each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served, and that the surety's liability may be

> enforced on motion and upon such notice as the court may require without the necessity of an independent action.

Utah R. Civ. P. Rule 62(i)(4). The Court, having reviewed the matter, finds that these requirements are met. The Plaintiffs have obtained a sufficient personal bond from Utah residents who have filed an affidavit setting forth reasonable detail as to their assets and liabilities. Further, the sureties have submitted to the jurisdiction of the Court. While the Court can understand the Defendants' desire to have greater documentation of the assets and liabilities of the sureties, the requirements of the rule have been met. Therefore, the Court will approve the bond. Pursuant to Rule 62(d), the stay is now in effect and will encompass all orders of this Court, including the release of the lis pendens, which the Defendants did not object to.

ORDER

Therefore, based upon the foregoing, IT IS HEREBY ORDERED that the motion to amended is DISMISSED and the motion for stay and approval of the bond is GRANTED. The Court further orders the sureties in this matter, consistent with their affidavit, to take no action to lessen or deplete their assets during the pendency of the appeal. Aff. David and Yvonne Kennison, ¶4.

Dated this 15 day of Nov., 2006.

BY THE COURT:

JOHN R. ANDERSON, DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040800079 by the method and on the date specified.

METHOD	NAME
Mail	CLARK B ALLRED ATTORNEY DEF 363 E MAIN ST STE 201 VERNAL, UT 84078
Mail	ALVIN R LUNDGREN ATTORNEY PLA 5015 W OLD HWY STE 200 MT GREEN UT 84050

Dated this 21 day of November, 2006.

Deputy Court Clerk

ADDENDUM I

REAL ESTATE PURCHASE CONTRACT

This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

Buyer Tyler Eldridge & Marva J. Eldridge offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of $1,000.00 in the form of personal check which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law. JJE

Received by Basin Land Title & Abstract (Date)

(Signature of Agent/Broker acknowledges receipt of Earnest Money)

Brokerage: NLB Phone Number

OFFER TO PURCHASE

1. **PROPERTY:** 280 acres ± 120 Shares ± Water (Irrigation)
also described as: 4143 West 6885 North
City of Neola County of Duchesne State of Utah, Zip 84053 (the "Property").

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently attached to the Property: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system; permanently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title:

1.2 Excluded Items. The following items are excluded from this sale: Books + Bookshelf, Desk + Lawn Mower, Pictures + Clothing

1.3 Water Rights. The following water rights are included in this sale: 120 shares ± Water which A-e (30 Dry Gulch) + (40 BIA)

1.4 Survey. (Check applicable boxes) A survey [ ] WILL [X] WILL NOT be prepared by a licensed surveyor. The Survey Work will be: [ ] Property corners staked [ ] Boundary Survey [ ] Boundary & Improvements survey [ ] Other (specify) _____. Responsibility for payment [ ] Buyer [ ] Seller [ ] Buyer and Seller share equally. Buyer's obligation to purchase under this Contract [ ] IS [ ] IS NOT conditioned upon Buyer's approval of the Survey Work. If yes the terms of the attached Survey Addendum apply.

2. **PURCHASE PRICE.** The Purchase Price for the Property is $ ~~340,000~~ 339,000.00

2.1 Method of Payment. The Purchase Price will be paid as follows:

$1,000.00 (a) **Earnest Money Deposit.** Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

$338,000.00 (b) **New Loan.** Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: [ ] CONVENTIONAL [ ] FHA [ ] VA [X] OTHER (specify) CONVENTIONAL
If an FHA/VA loan applies, see attached FHA/VA Loan Addendum.
If the loan is to include any particular terms, then check below and give details:
[ ] SPECIFIC LOAN TERMS _____

$ _____ (c) **Loan Assumption** (see attached Assumption Addendum if applicable)
$ _____ (d) **Seller Financing** (see attached Seller Financing Addendum if applicable)
$ _____ (e) **Other** (specify) _____
$ _____ (f) **Balance of Purchase Price in Cash at Settlement**

$ ~~340,000~~ 339,000 **PURCHASE PRICE.** Total of lines (a) through (f)

EXHIBIT 5 J Farnsworth 6-17-05

2.2 **Financing Condition.** (check applicable box)

(a) [X] Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c) (the "Loan"). This condition is referred to as the "Financing Condition."

(b) [ ] Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.

2.3 **Application for Loan.**

(a) **Buyer's duties.** No later than the Application Deadline referenced in Section 24(a), Buyer shall apply for the Loan. "Loan Application" occurs only when Buyer has: (i) completed, signed, and delivered to the lender (the "Lender") the initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) **Procedure if Loan Application is denied.** If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) if the Loan Denial was received by Buyer on or before the 24 day of Sept., 2004, the Earnest Money Deposit shall be returned to Buyer; (ii) if the Loan Denial was received by Buyer after that date, Buyer agrees to forfeit, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

2.4 **Appraisal of Property.** Buyer's obligation to purchase the Property [X] IS [ ] IS NOT conditioned upon the Property appraising for not less than the Purchase Price. If the appraisal condition applies and the Property appraises for less than the Purchase Price, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after Buyer's receipt of notice of the appraised value. In the event of such cancellation, the Earnest Money Deposit shall be released to Buyer. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the appraisal condition by Buyer.

3. **SETTLEMENT AND CLOSING.** Settlement shall take place on the Settlement Deadline referenced in Section 24(d), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (½) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(d), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. **POSSESSION.** Seller shall deliver physical possession to Buyer within [ ] 1 hours [ ] 0 days after Closing; [ ] Other (specify) _____

5. **CONFIRMATION OF AGENCY DISCLOSURE.** At the signing of this Contract:

[ ] Seller's Initials [ ] Buyer's Initials

The Listing Agent, N/A, represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

The Selling Agent, N/A, represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

The Listing Broker, N/A, represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

The Selling Broker, N/A, represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent.

6. **TITLE INSURANCE.** At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price.

7. **SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(b), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":
(a) a Seller property condition disclosure for the Property, signed and dated by Seller;
(b) a commitment for the policy of title insurance;
(c) a copy of any leases affecting the Property not expiring prior to Closing.
(d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
(e) Other (specify) N/A

8. **BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS.** Buyer's obligation to purchase under this Contract (**check applicable boxes**):
[X] IS [ ] IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
[X] IS [ ] IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
[ ] IS [X] IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify)

If any of the above items are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

8.1 Evaluations & Inspections Deadline. No later than the Evaluations & Inspections Deadline referenced in Section 24(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

8.2 Right to Cancel or Object. If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. **ADDITIONAL TERMS.** There [ ] ARE [X] ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: [ ] Addendum No. _____
[ ] Survey Addendum [ ] Seller Financing Addendum [ ] FHA/VA Loan Addendum [ ] Assumption Addendum
[ ] Lead-Based Paint Addendum (in some transactions this addendum is required by law)
[ ] Other (specify) _____

10. **SELLER WARRANTIES & REPRESENTATIONS.**

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed, unless the sale is being made pursuant to a real estate contract which provides for title to pass at a later date. In that case, title will be conveyed in accordance with the provisions of that contract. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way and subject to the contents of the Commitment

 Seller's Initials _____ Date 5/24/04 Buyer's Initials TOE Date 8/27/04

y Title Insurance as agreed to by Buyer under Section 6. Buyer also agrees to take the Property subject to existing leases ffecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners ssociation dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically ssumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, echanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners ssociation dues.

10.2 **Condition of Property.** Seller warrants that the Property will be in the following condition: **ON THE DATE SELLER ELIVERS PHYSICAL POSSESSION TO BUYER:**

(a) the Property shall be broom-clean and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense;

(b) the heating, cooling, electrical, plumbing and sprinkler systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;

(c) the roof and foundation shall be free of leaks known to Seller;

(d) any private well or septic tank serving the Property shall have applicable permits and shall be in working order and fit for its intended purpose; and

(e) the Property and improvements, including the landscaping, will be in the same general condition as they were on the date of Acceptance.

11. **WALK-THROUGH INSPECTION.** Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 8.4 and 10.2 ("the items") are respectively present, repaired/changed as agreed, and in the warranted condition. If the items are not as represented, Seller will, prior to Settlement, replace, correct or repair the items or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented.

12. **CHANGES DURING TRANSACTION.** Seller agrees that: from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances to the Property shall be made.

13. **AUTHORITY OF SIGNERS.** If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company, or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. **COMPLETE CONTRACT.** This Contract together with its addenda, any attached exhibits and Seller Disclosures constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. **DISPUTE RESOLUTION.** The parties agree that any dispute, arising prior to or after Closing, related to this Contract **[ ] SHALL [X] MAY** (upon mutual agreement of the parties) first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

16. **DEFAULT.** If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

17. **ATTORNEY FEES AND COSTS.** In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

18. NOTICES. Except as provided in Section 23, all notices required under this Contract must be: (a) in writing, (b) signed by the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. ABROGATION. Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, receipt of the Seller Disclosures, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

22. FAX TRANSMISSION AND COUNTERPARTS. Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

23. ACCEPTANCE. "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

24. CONTRACT DEADLINES. Buyer and Seller agree that the following deadlines shall apply to this Contract:

(a) Application Deadline	Sept. 1, 2004	(Date)
(b) Seller Disclosure Deadline	Sept. 15, 2004	(Date)
(c) Evaluations & Inspections Deadline	Sept. 24, 2004	(Date)
(d) Settlement Deadline	Oct. 24, 2004	(Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 4:00 [ ] AM [X] PM Mountain Time on 8/25/04 (Date), this offer shall lapse and the Brokerage shall return the Earnest Money Deposit to Buyer.

Ty D. Eldridge	8/22/04	Marina J Eldridge	
(Buyer's Signature)	(Offer Date)	(Buyer's Signature)	(Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date."

TY D & MARINA J Eldridge	3916 N. 3900 W Morgan UT 84050	801 876 25.
(Buyers' Names) (PLEASE PRINT)	(Notice Address)	(Phone)

ACCEPTANCE/COUNTEROFFER/REJECTION

HECK ONE:

[X] ACCEPTANCE OF OFFER TO PURCHASE: Seller Accepts the foregoing offer on the terms and conditions specified above.

[ ] COUNTEROFFER: Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. _____.

8/24/04

eller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

JAMES L. FARNSWORTH 3455 W. 5665 Lake Shore UT 801 404 1898

ellers' Names) (PLEASE PRINT) (Notice Address) (Phone)

[ ] REJECTION: Seller Rejects the foregoing offer.

eller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

DOCUMENT RECEIPT

ate law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures. (Fill in applicable ction below.)

I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:

ry D. Eldridge 8-27-04 Marina Eldridge 8-27-04

uyer's Signature) (Date) (Buyer's Signature) (Date)

8/24/04

eller's Signature) (Date) (Seller's Signature) (Date)

I personally caused a final copy of the foregoing Contract bearing all signatures to be [ ] faxed [ ] mailed [ ] hand livered on _____ (Date), postage prepaid, to the [ ] Seller [ ] Buyer.

Sent/Delivered by (specify) _____

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE SEPTEMBER 30, 1999. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ADDENDUM J

RESIDENTIAL LEASE WITH OPTION TO PURCHASE

THIS AGREEMENT made and entered into this 5 day of October 19 2004 by and between W David, Gregory A. 3 James L. Farnsworth hereinafter called Lessor and Ty D. & Marcia J Eldridge and/or assigns, hereinafter called Lessee. The Lessor, for and in consideration of the sum of 24,000.00 dollars in hand paid by the Lessee, receipt of which is hereby acknowledged, hereby leases to the Lessee, his heirs or assignees, the premises situated in the City of Neola County of Duchesne State of Utah legally described as (see attached for exact legal description) 280 acres 120 shares water, private well, house and o.t buildings

(If the legal description is not included at the time of execution, it may be attached to and incorporated herein thereafter.) (Street address 4143 W 6885 N. Neola UT 84053) and consisting of 5 bedrm, 2 bath ranch upon the following TERMS and CONDITIONS

1. **PERSONAL PROPERTY:** Said lease shall include the following personal property: washer, dryer, water softner, new fridge / freezer.

2. **TERM:** The term hereof shall commence on Nov 1 19 2004 and continue for a period of 36 months thereafter.

3. **RENT:** Rent shall be $ 1675.00 per month, payable in advance, upon the first day of each calendar month to Lessor or his authorized agent at the following address: 3145 W. 5600 S. Lake Shore UT 84660 or at such other places as may be designated by Lessor from time to time. In the event rent is not paid within five (5) days after due date, Lessee agrees to pay a late charge of $ 0 plus interest at 5 % per annum on the delinquent amount.

4. **UTILITIES:** Lessee shall be responsible for the payment of all utilities and services except None which shall be paid by Lessor.

5. **USE:** The premises shall be used as a residence and for no other purpose without the prior written consent of the Lessor.

6. **HOUSE RULES:** In the event that the premises are a portion of a building containing more than one unit, Lessee agrees to abide by any and all house rules, whether promulgated before or after the execution hereof, including, but not limited to, rules with respect to noise, odors, disposal of refuse, pets, parking, and use of common areas.

7. **ASSIGNMENT AND SUBLETTING:** Lessee may assign this agreement or sublet any portion of the premises without prior written consent of the Lessor.

8. **MAINTENANCE, REPAIRS OR ALTERATIONS:** Lessee shall maintain the premises in a clean and sanitary manner including all equipment, appliances, furniture and furnishings therein and shall surrender the same at termination hereof, in as good condition as received, normal wear and tear excepted. Lessee shall be responsible for damages caused by his negligence and that of his family or invitees or guests. Lessee shall irrigate and maintain any surrounding grounds, including lawns and shrubbery, and keep the same clear of rubbish and weeds, if such grounds are a part of the premises and are exclusively for the use of the Lessee.

9. **ENTRY AND INSPECTION:** Lessee shall permit Lessor or Lessor's agents to enter the premises at reasonable times and upon reasonable notice for the purpose of inspecting the premises or for making necessary repairs.

10. **POSSESSION:** If Lessor is unable to deliver possession of the premises at the commencement hereof, Lessor shall not be liable for any damage caused thereby nor shall this agreement be void or voidable, but Lessee shall not be liable for any rent until possession is delivered. Lessee may terminate this agreement if possession is not delivered within 15 days of the commencement of the term hereof.

11. **SECURITY:** The security deposit of $ 0 shall secure the performance of the Lessee's obligations hereunder. Lessor may, but shall not be obligated to, apply all or portions of said deposit on account of Lessee's obligations hereunder. Any balance remaining upon termination shall be returned to Lessee.

12. **DEPOSIT FUNDS:** Any returnable deposits shall be refunded within fifteen days from date possession is delivered to Lessor or his Authorized Agent.

13. **ATTORNEY FEES:** The prevailing party shall be entitled to all costs incurred in connection with any legal action brought by either party to enforce the terms hereof or relating to the demised premises, including reasonable attorney fees.

14. **NOTICES:** Any notice which either party may or is required to give may be given by mailing the same, postage prepaid, to Lessee or to Lessor at the addresses shown below or at such other places as may be designated by the parties from time to time.

15. **HEIRS, ASSIGNS, SUCCESSORS:** This lease and option shall inure to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

16. **TIME:** Time is of the essence of this agreement. This offer shall terminate if not accepted before Nov 1 19 2004

17. **HOLDING OVER:** Any holding over after expiration of the term of this lease, with the consent of Lessor, shall be construed as a month-to-month tenancy in accordance with the terms hereof, as applicable.

18. **DEFAULT:** If Lessee shall fail to pay rent when due, or perform any term hereof, after the failure continues for 3 days written notice of such default given in the manner required by law, the Lessor, at his option, may terminate all rights of Lessee hereunder, unless Lessee, within said time, shall cure such default. If Lessee abandons or vacates the property, while in default of the payment of rent, Lessor may consider any property left on the premises to be abandoned and may dispose of the same in any manner allowed by law. In the event the Lessor reasonably believes that such abandonad property has no value, it may be discarded.

EXHIBIT 6

OPTION: Lessee shall have the option to purchase the leased premises described herein upon the following TERMS and CONDITIONS.

a.) The total purchase price shall be $ 305,000.00 (Three hundred five thousand) Dollars)

b.) The purchase price shall be paid as follows. All cash

ENCUMBRANCES: Lessee shall take title to the property subject to: 1) Real Estate Taxes not yet due and 2) Covenants, conditions, restrictions, reservations, rights, rights of way d easements of record, if any, which do not materially affect the value or intended use of the property

EXAMINATION OF TITLE: Fifteen (15) days from date of exercise of this option are allowed the Lessee to examine the title to the property and to report in writing any valid jections thereto. Any exceptions to the title which would be disclosed by examination of the records shall be deemed to have been accepted unless reported in writing within said 15 ys. If Lessee objects to any exceptions to the title, Lessor shall use all due diligence to remove such exceptions at his own expense within 60 days thereafter. But if such exceptions annot be removed within the 60 days allowed, all rights and obligations hereunder may, at the election of the Lessee, terminate and, unless he elects to purchase the property subject o such exceptions.

EVIDENCE OF TITLE: Lessor shall provide evidence of Title in the form of a policy of title insurance at Lessor's expense

BILL OF SALE: The personal property identified in paragraph 1 shall be conveyed by bill of sale

CLOSING: Closing shall be within 45 days from exercise of the option unless otherwise extended by other terms of this agreement.

PRORATIONS: Tax and insurance escrow account, if any, to be transferred intact to Lessee with no prorations. Interest and other expenses of the property to be prorated as of the date of closing. Unpaid real estate taxes, security deposits, advance rentals or considerations involving future lease credits shall be credited to Lessee.

EXPIRATION OF OPTION: This option may be exercised at any time prior to its expiration at midnight Nov 1 ~~19~~ 2007 Upon expiration, Lessor shall be released from all obligations hereunder and all of Lessee's rights hereunder, legal or equitable, shall cease

EXERCISE OF OPTION: The option shall be exercised by mailing or delivering written notice to the Lessor prior to the expiration of this option. Notice, if mailed, shall be by certified mail, postage prepaid, to the Lessor at the address set forth below, and shall be deemed to have been given upon the day shown on the postmark of the envelope in which such notice is mailed. In the event the option is exercised, 25 percent from the rent paid hereunder prior to the exercise of the option shall be credited upon the purchase price.

RIGHT TO SELL: Lessor warrants to Lessee that Lessor is the legal owner of the leased premises and has the legal right to sell leased premises under the terms and conditions of this agreement.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

Ty D. Eldridge
LESSEE

LESSOR

Marina J. Eldridge
LESSEE

LESSOR

3916 N. 3900 W. Morgan UT 84050
ADDRESS

ADDRESS

MAILING CERTIFICATE

I, Debbie Reed, am employed by the office of ALLRED & McCLELLAN, P. C., attorneys for Defendants herein, and hereby certify that I served two copies of the BRIEF OF APPELLEES/CROSS-APPELLANTS on counsel for Plaintiffs by placing true and correct copies thereof in an envelope addressed to:

ALVIN R LUNDGREN
ALVIN R LUNDGREN L.C.
5105 W OLD HWY STE 200
MTN GREEN UT 84050

and deposited the same, sealed, with first class postage prepaid thereon, in the United States mail at ~~Roosevelt~~ Vernal, Utah, on the 27th day of November, 2006.

Debbie Reed